

U.S. DISTRICT COURT FOR THE DISTRICT OF DELAWARE
Appeal from the U.S. Bankruptcy Court
For the District of Delaware

Marjorie Joan Martin,

Appellant,

Appeal Case No. 1:06-cv-389

v.

ANC Rental Corporation,

Appellee.

APPELLANT MARJORIE JOAN MARTIN'S OPENING BRIEF

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STATEMENT OF APPELLATE JURISDICTION

This is an appeal from the Order and Memorandum Opinion dated April 28, 2006 (“Opinion”) of the Honorable Mary F. Walrath of United States Bankruptcy Court for the District of Delaware (“Bankruptcy Court”) in Bankruptcy Case No. 01-11200. Pursuant to Fed. R. Bankr. P. 7054, which incorporates Fed. R. Civ. P. 54, the Opinion is a final order. 28 U.S.C. § 158(a)(1) provides that the district courts of the United States shall have jurisdiction to hear appeals from a final order of a bankruptcy court. Thus, this Court has jurisdiction to hear this appeal.

STATEMENT OF ISSUES

I. To constitute an allowed administrative claim under 11 U.S.C. § 503(b)(1)(A), the claim must (A) arise after the filing of the bankruptcy case and (B) be an actual, necessary cost and expense of preserving the bankruptcy estate. Did the Bankruptcy Court err in holding that Mrs. Martin’s common-law indemnity claim did not constitute an allowed administrative expense?

Standard of Review: On appeal, the district court applies a clearly erroneous standard to the bankruptcy court’s findings of fact and a plenary standard to its legal conclusions. In re Harnischfeger Industries, Inc., 316 B.R. 616, 619 (D. Del. 2003). The district court exercises plenary review of the bankruptcy court’s interpretation of state law and its application to a bankruptcy proceeding. In re IT Group, Inc., 302 B.R. 483, 486 (D. Del. 2003); In re Kester, 339 B.R. 749, 751 (B.A.P. 10th Cir. 2006).

A. Established Third Circuit law recognizes that a common-law indemnity claim arises for purposes of the Bankruptcy Code when there exists a right to payment under applicable law. Under Minnesota law, a right to payment for a

common-law claim of indemnity arises at the time the judgment is paid or, at the earliest, when a defendant is permitted to institute a third-party suit against one who may be liable. Mrs. Martin was involved in an accident with Plaintiffs while driving a car rented from Debtors. After the bankruptcy cases were filed, Plaintiffs brought suit against Mrs. Martin and Debtors, and she asserted a common-law indemnity claim against Debtors. Plaintiffs were awarded judgment against Mrs. Martin and Debtors. The Minnesota district court ordered Debtors to indemnify Mrs. Martin under the common-law. Mrs. Martin paid Plaintiffs \$2.44 million in satisfaction of their judgment against her and Debtors. Did the Bankruptcy Court err in holding that Mrs. Martin's common-law indemnity claim arose prior to the filing of the bankruptcy cases?

- B. The Supreme Court has held that an actual, necessary cost and expense of preserving the estate includes tort claims against a debtor because the injured party should enjoy the same priority as the expense for insurance premiums and it is inequitable for an injured party to bear the costs. Mrs. Martin's common-law indemnity claim is an equitable claim, which arose because she satisfied Plaintiffs' tort judgment against Debtors. Debtors had an opportunity to purchase insurance post-petition to cover such claims, which would have been entitled to priority treatment under section 503. Because the Bankruptcy Court held that Mrs. Martin's common-law indemnity claim was a pre-petition claim, it did not address this issue. Is Mrs. Martin's claim an actual, necessary expense and cost?

STATEMENT OF THE CASE AND FACTS

I. ANC RENTAL CORPORATION, INC., ALAMO RENT-A-CAR, LLC AND RELATED ENTITIES FILED BANKRUPTCY.

On November 13, 2001, ANC Rental Corporation, Inc. (“ANC”), Alamo Rent-A-Car, LLC (“Alamo”) and other related entities (collectively, “Debtors”) filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. (Appellant’s Appendix (“AA”) p. A3.) In April 2004, the Bankruptcy Court confirmed the Debtors’ plan of reorganization. (Id. at A4.)

The plan authorized the Liquidating Trust of ANC Rental Corporation, Inc. (the “Trust”) to object to claims and make distributions to creditors pursuant to the plan. (Id.) Under the plan, administrative claims are to be paid in full, whereas, general unsecured claims are projected to receive a distribution of 1% to 3%. (Debtor’s Plan of Reorganization.)

II. MRS. MARTIN RENTED A CAR FROM ALAMO AND WAS INVOLVED IN AN ACCIDENT.

In July 2001, Marjorie Martin leased a car from Alamo. Affidavit of Lee La Bore (AA. p. A39.) The rental agreement provided that Mrs. Martin’s insurance coverage was primary. (Id. at A40, A75.) While driving the car leased from Alamo, Mrs. Martin was involved in an accident in Minnesota with another vehicle in which three people were traveling. (Id. at A39.) Two of the occupants were fatally injured and the third suffered serious injuries. (Id.) Mrs. Martin also suffered injuries. (Id.)

III. AFTER THE BANKRUPTCY CASES WERE FILED, PLAINTIFFS COMMENCED AN ACTION AGAINST DEBTORS AND MRS. MARTIN, AND MRS. MARTIN ASSERTED A COMMON-LAW INDEMNITY CLAIM AGAINST DEBTORS.

In April 2002 – six months after Debtors commenced their bankruptcy cases – representatives of the other parties to the accident (“Plaintiffs”) filed suit in Dakota County, Minnesota against Mrs. Martin. (*Id.* at A39, A45.) Mrs. Martin filed and served an answer denying liability and asserted a number of affirmative defenses. (*Id.* at A40, A54.)

In April 2003, the Bankruptcy Court approved a stipulation for relief from the stay between Plaintiffs and Debtors permitting only Plaintiffs to name Debtors as defendants and proceed only to judgment. (*Id.* at A40, A57.) Mrs. Martin was not a party to the stipulation. (*Id.*) Plaintiffs then served an amended complaint naming Mrs. Martin, Alamo, and ANC as defendants. (*Id.* at A40, A60.) Mrs. Martin and Debtors separately answered the amended complaint and filed competing cross-claims for indemnity. (*Id.* at A40, A74.)

IV. DEFENDANTS WERE FOUND JOINTLY AND SEVERALLY LIABLE AND DEBTORS WERE ORDERED TO INDEMNIFY MRS. MARTIN.

In September 2003, the jury returned a \$2.5 million verdict in favor of Plaintiffs and found Debtors and Mrs. Martin jointly and severally liable. (*Id.*) On October 31, 2003, the Minnesota district court held that by failing to meet the requirements of Minn. Stat. § 65B.49 subd. 5(a)(1)(2) (the “Minnesota No-Fault Automobile Insurance Statute”), Debtors became self-insured entities with uncapped liability. (*Id.* at A75, “October 31, 2003 Order”). In addition, the court held that Mrs. Martin was indemnified by Debtors to the full extent of any net judgment entered in this matter, as follows:

By failing to meet the statutory requirements of Minn. Stat. § 65B.49, subd. 5(a)(1)(2), Defendant ANC/Alamo becomes a self-insured entity with uncapped liability. Under *Hertz v. State Farm*, 573 N.W. 2d 686 (Minn. 1998), a self-insured rental car company is primary for provision liability coverage for any loss while a customer is operating a rental vehicle. The self-insured rental car

company is treated as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as a named insured. See id. Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive users as additional unnamed insureds. As such, the liability of the permissive driver of the rented vehicle (here, Defendant Martin) would be fully covered by virtue of the omnibus clause. See id. Accordingly, Defendant Martin is indemnified by Defendant ANC/Alamo for the losses that were sustained while she was operating the rental vehicle.

(Id.) In a subsequent order, the Minnesota district court made clear that the indemnity claim was a common-law claim because it arose under the “principles of indemnification.” (Id. at A77, “February 10, 2004 Order.”) Finally, the Minnesota district court dismissed Debtors’ cross-claim for indemnity against Mrs. Martin with prejudice. (Id. at A75.)

V. MRS. MARTIN PAID THE JUDGMENT AND TIMELY FILED THIS ADMINISTRATIVE EXPENSE CLAIM.

In January 2004, Mrs. Martin paid Plaintiffs \$2.44 million in full settlement of Plaintiffs’ judgment against her and Debtors. (Id. at A41, A78.) In March 2004, Mrs. Martin timely filed an administrative claim under 11 U.S.C. § 503(b)(1)(A) for the same amount. (Id. at A41, A79.) On March 24, 2006, Mrs. Martin filed a motion for allowance and payment of the administrative claim. (Id. at A4.) On April 20, 2006, the Trust in its capacity as the transferee of Debtors’ rights and interest filed an objection to Mrs. Martin’s motion. (Id. at A5.)

VI. THE BANKRUPTCY COURT DENIED MRS. MARTIN’S MOTION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM.

On April 28, 2006, the Bankruptcy Court entered the Opinion denying Mrs. Martin’s motion for allowance and payment of administrative claim. (Id. at A1.) The Bankruptcy Court held that “the indemnification obligation was an implied-at-law term of the actual contract between the Debtors and Martin.” (Id. at A9 (emphasis in original).) Because the rental agreement was executed prior to the filing of the case, the Bankruptcy Court held that Mrs. Martin’s indemnity claim arose pre-petition. (Id. at A9-A10.) Accordingly, the Bankruptcy

Court denied Mrs. Martin's motion for allowance and payment of the administrative claim. Mrs. Martin timely appealed. (Id.)

SUMMARY OF ARGUMENT

Mrs. Martin rented a car from Debtors. In the rental agreement, Debtors attempted to thrust upon Mrs. Martin the obligation to provide coverage in the event of an accident. Mrs. Martin was, in fact, involved in an accident in which two people were killed and a third seriously injured.

After Debtors commenced their Chapter 11 cases, Plaintiffs commenced an action against Mrs. Martin. Relief from the automatic stay was obtained to permit Plaintiffs to name Debtors as a co-defendant. Mrs. Martin and Debtor asserted competing indemnity claims against each other.

After trial, the jury returned a \$2.5 million verdict finding Mrs. Martin and Debtors jointly and severally liable. The Minnesota district court held that Debtors failed to comply with the Minnesota No-Fault Automobile Insurance Statute by attempting to obligate Mrs. Martin to provide primary coverage under the rental agreement. The Minnesota district court also granted Mrs. Martin common-law indemnity claim, holding that Mrs. Martin was to be indemnified by Debtors for the net amount of the judgment.

After paying the judgment, Mrs. Martin filed a motion to allow and compel payment of her common-law indemnity claim as an administrative expense under 11 U.S.C. § 503. To constitute an administrative claim, the claim must arise after the filing of the petition. The United States Court of Appeals for the Third Circuit has held under New York law that a common-law indemnity claim arises when the judgment is paid or, at the earliest, when a defendant is permitted to institute a third-party suit against one who may be liable. Minnesota

law is identical. After the filing of the Debtors' petitions, Plaintiffs commenced an action against Mrs. Martin and Debtors, Mrs. Martin asserted a cross-claim for common-law indemnity against Debtors, and Mrs. Martin paid the judgment. Thus, Mrs. Martin's common-law indemnity claim arose post-petition pursuant to controlling Third Circuit precedent.

Nonetheless, the Bankruptcy Court held that Mrs. Martin's claim arose pre-petition on the grounds that Debtors' indemnity obligation was an implied-at-law term in the rental agreement between Mrs. Martin and Debtors. To the contrary, the Minnesota district court held that Mrs. Martin's claim arose under the common-law, which precluded the Bankruptcy Court's holding. Moreover, the Bankruptcy Court's holding runs contrary to Minnesota law and binding precedent. The Minnesota No-Fault Automobile Insurance Statute struck the provision purporting to provide that Mrs. Martin's coverage was primary. It did not and cannot replace that provision with one providing that Debtors were obligated to indemnify Mrs. Martin because no such cause of action exists under the statute. Because there existed no contractual indemnity provision, the Minnesota district court found that Mrs. Martin was to be indemnified under Minnesota common-law.

Further, the Bankruptcy Court's holding contradicts Third Circuit precedent. Under this precedent, to constitute an indemnity contract, the parties must specifically agree in advance to the indemnification. Mrs. Martin and Debtors never agreed that Debtors would indemnify Mrs. Martin. Indeed, the rental agreement provided that Mrs. Martin's coverage was primary. Finally, the Bankruptcy Court's decision effectively overrules the binding Third Circuit precedent as the salient facts are identical – there existed a contract between the parties that did not provide for indemnification and the indemnification obligation was subsequently implied-at-law pursuant to the common-law. Accordingly, Mrs. Martin respectfully requests that this Court

reverse the Bankruptcy Court's Opinion and enter an order allowing Mrs. Martin's administrative claim in the amount of \$2.44 million and ordering Debtors and the Trust to immediately pay the same.

ARGUMENT

I. SECTION 503 OF THE BANKRUPTCY CODE SETS FORTH THE REQUIREMENTS OF AN ADMINISTRATIVE EXPENSE CLAIM.

Administrative claims are entitled to priority in payment. 11 U.S.C. § 507. In a chapter 11 case such as this one, the plan cannot be confirmed unless it provides for payment in full of all administrative claims. 11 U.S.C. § 1129(a)(9)(A). In contrast, general unsecured claims – those that arose before the filing of the case – are projected to receive a 1% to 3% distribution. (Debtor's Plan of Reorganization.)

11 U.S.C. § 503 governs the allowance of administrative expense claims. It provides that:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under § 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate including wages, salaries, or commissions for services rendered after the commencement of the case.

11 U.S.C. § 503(b).²

To qualify as an allowed administrative expense under section 503, a claim must (1) arise post-petition and (2) be an actual, necessary cost and expense of preserving the bankruptcy estate. Penn. Dept. of Env. Res. v. Tri-State Clinical Labs., Inc., 178 F.2d 685, 689 (3d Cir. 1999); Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.), 536 F.2d 950, 955 (1st Cir.

² In April 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act was enacted. Section 1501(a) provides that the amendments apply to bankruptcy cases commenced after October 17, 2005. Debtors' cases were commenced in November 2001. Thus, the 2005 amendments to section 503(b) do not apply.

1976). When a claim arises is determined by state law. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946); Avellino & Bienes v. Frenville Co., Inc. (In re Frenville Co., Inc.), 744 F.2d 332, 335 (3d Cir. 1984).

II. THE MINNESOTA DISTRICT COURT HELD THAT DEBTORS FAILED TO COMPLY WITH THE MINNESOTA NO-FAULT AUTOMOBILE INSURANCE STATUTE AND ORDERED DEBTORS TO INDEMNIFY MRS. MARTIN PURSUANT TO MINNESOTA COMMON-LAW.

The Minnesota district court was confronted with the following issues: (1) whether Mrs. Martin or Debtors were “primary” as to the damages sustained by the Plaintiffs and (2) whether Mrs. Martin or Debtors were entitled to indemnification in the event that either paid more than its share of any judgment.

Debtors relied on the language of the rental agreement in support of their first position. That agreement provided Mrs. Martin was primary and, therefore, Debtors argued she had an obligation to indemnify them. In contrast, Mrs. Martin asserted that the rental agreement violated the Minnesota No-Fault Automobile Insurance Statute, which established Debtors were primary. In the event Mrs. Martin paid the judgment, the common-law claim of indemnity provided Debtors were liable to Mrs. Martin for the amount paid.

In accordance with the Minnesota No-Fault Automobile Insurance Statute and established case law, the Minnesota district court employed the “conceptual policy approach” to determine whether the contract between Debtors as a self-insured entity and Mrs. Martin was enforceable. (AA. p. A75.) Under this approach, the Minnesota district court hypothesized that Debtors purchased a policy naming themselves as insureds:

The self-insured rental car company is treated as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as a named insured. [Hertz Corp. v. State Farm, 573 N.W.2d 686 (Minn. 1998)]. Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive users as additional unnamed insureds. As such, the liability of the permissive

driver of the rented vehicle (here, Defendant Martin) would be fully covered by virtue of the omnibus clause. See id.

(Id.)³ Because the rental agreement conflicted with the “imagined policy,” the Minnesota district court struck the offending language in the rental agreement and held that Debtors were primary. (Id.); see also Hertz Corp., 573 N.W.2d at 689-90.

This holding ran contrary to the terms of the rental agreement; therefore, the Minnesota district court held that Mrs. Martin was to be indemnified under the common-law. (AA. p. A75.) The court made clear in a subsequent order the common-law nature of the claim, noting that it arose from the “principles of indemnification.”⁴ (Id. at A77.)

³ The conceptual policy approach was first mentioned by Justice Simonett in McClain v. Begley, 465 N.W.2d 680, 682 (Minn. 1991) and formed the basis of the Minnesota Supreme Court decision that undergirds the Minnesota district court’s opinion. See Hertz Corp. v. State Farm Mutual Ins. Co., 573 N.W.2d 686 (Minn. 1998). The Hertz court was confronted with a declaratory action between two competing insurers to determine which coverage was primary. Id. at 688. This decision makes apparent that the conceptual policy approach is a product of the Minnesota No-Fault Automobile Insurance Statute, and not common-law indemnity as held by the Bankruptcy Court:

Further, in his concurring opinion in McClain, Justice Simonett concluded that, in considering the application of the No-Fault Act to self-insureds, we should “treat the self-insurer as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as the named insured. Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive drivers as additional unnamed insureds.” Id. at 684. Applying this conceptual approach here, one could identify Powers as a permissive driver of the rented vehicle, whose liability would be fully covered by virtue of the omnibus clause.

Id. at 689. The procedural posture – a declaratory action where neither insurer had asserted a common-law claim for indemnity or paid any amounts on account of the underlying claim – cements the fact that the conceptual policy approach is restricted to the Minnesota No-Fault Automobile Insurance Statute. Id. at 688.

⁴ Limited provisions of the Minnesota No-Fault Automobile Insurance Statute provide a statutory right of indemnification. For instance, section 65B.53 grants a right of indemnity to an insurer who pays no-fault benefits to a claimant injured through the negligent operation of a commercial vehicle such as a public bus. See Metropolitan Property and Casualty

III. UNDER THIRD CIRCUIT PRECEDENT, MRS. MARTIN'S COMMON-LAW CLAIM FOR INDEMNITY AROSE POST-PETITION WHEN THE JUDGMENT WAS PAID.

A. In The Third Circuit, A Common-law Indemnity Claim Does Not Arise At The Time Of The Underlying Act, Rather, When The Judgment Is Paid.

In Frenville Co., Inc., the Third Circuit addressed whether an indemnity claim under New York law arose before or after the filing of the petition. 744 F.2d 332, 337 (3d Cir. 1985). In that case, the soon-to-be debtor entered into an agreement with an accountant to prepare certified financial statements. Id. at 333. After the filing of the petition, the secured creditors brought claims against the accountant on the basis that it negligently, recklessly, and fraudulently prepared the debtor's financial statements. Id. The accountant sought to assert an indemnity claim against the debtor as a result of the suit by the secured creditors. Id. at 334. The debtor argued that the claim was a pre-petition claim and was barred by the automatic stay, whereas, the accountant argued that the claim was a post-petition claim, which is not stayed. Id. at 336.

The court stated that the Bankruptcy Code defines "claim" broadly in section 101(5), but a claim does not arise until there exists a "right to payment."⁵ Id. The court recognized that when "parties agree in advance that one party will indemnify the other in the event of a certain

Insurance Company v. Metropolitan Transit Comm'n, 538 N.W. 2d 692, 695 (Minn. 1995). No provision of the Minnesota No-Fault Automobile Insurance Statute provides a right of indemnity to Ms. Martin. Accordingly, the Minnesota district court could not have held that Debtors' liability to Ms. Martin arose under statute.

⁵ The Bankruptcy Code defines a "claim" as:

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

occurrence, there exists a right to payment, albeit contingent, upon the signing of the agreement.” 744 F.2d at 336. The court held that “[t]he debtor and accountant, however, had no indemnity agreement.” Id. at 337. Accordingly, the common-law indemnity claim did not arise upon the parties entering into the agreement. Id.

Because the question of when a right to payment arises is determined by state law, the court turned to New York law. Id.; see also Vanston Bondholders Protective Comm., 329 U.S. at 161. Under New York law, a claim for indemnification does not arise at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from the act. In re Frenville, 744 F.2d at 337; see also Blum v. Good Humor Corp., 57 A.D.2d 911 (N.Y. App. Div. 1977). Although such a claim does not mature until payment is made, the New York Civil Practice Code permits a defendant to institute a third-party complaint against a party who may be liable to him for all or part of the plaintiff’s claim after service of his answer. In re Frenville Co., Inc., 744 F.2d at 337; see also N.Y. Civ. Prac. Law § 1007 (McKinney 1976).

As a result, the Third Circuit held that because the suit, which gave rise to the common-law claim for indemnity, was not commenced and any judgment would not be paid until after the debtor’s bankruptcy petition was filed, the common-law indemnity claim was a post-petition claim.⁶ In re Frenville Co., Inc., 744 F.2d at 337.

B. Pursuant To Minnesota Law, Mrs. Martin’s Common-law Indemnity Claim Arose Post-Petition Because She Did Not Have A Right To Payment Until After The Filing Of The Cases.

As described above, the Minnesota district court held that Mrs. Martin’s right to payment is based on the common-law right of indemnification. (AA. p. A74-A77.) She had and has no other right to payment such as a contractual or statutory right. The contract between the parties

⁶ “Frenville remains the law of this Circuit.” In re W.R. Grace & Co., 281 B.R. 852, 860 (Bankr. D. Del. 2002) (citing Jones v. Chunetron Corp., 212 F.3d 199, 206 (3d Cir. 2000)).

provided that Mrs. Martin's coverage was primary. The Minnesota No-Fault Automobile Insurance Statute provides and established only that Debtors are primary. No statute, including the Minnesota No-Fault Automobile Insurance Statute, establishes Debtors are liable to Mrs. Martin if she paid the judgment. Thus, as held by the Minnesota district court, Debtors' indemnity obligation to Mrs. Martin arose under Minnesota common-law.

Minnesota and New York law are identical as to when a common-law claim for indemnity arises. Under Minnesota law, a claim of indemnity does not arise at the time of the commission of the underlying act; rather, the claim arises at the time of the payment of the judgment flowing from the act. Dixon v. Northwestern Nat'l Bank of Minneapolis, 275 F. Supp. 582, 584 (D. Minn. 1967); City of Wilmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872, 874-75 (Minn. 1994); Trapp v. R-Vee Corp., 359 N.W.2d 323, 327 (Minn. Ct. App. 1984). Although such a claim does not mature until payment is made, the Minnesota Rules of Civil Procedure permit a defendant to institute a claim against another party who may be liable for all or part of the plaintiff's claim after service of the answer. Minn. R. Civ. P. 13 and 14.

In accordance with In re Frenville and Minnesota law, Mrs. Martin's common-law claim for indemnity against Debtors did not arise until, at the earliest, the date the underlying suit was brought. That suit was commenced in April 2002, which was approximately six months after Debtors filed bankruptcy. Mrs. Martin did not pay the judgment until January 2004, which is over three years after Debtors filed for bankruptcy. Accordingly, Mrs. Martin's claim arose after the filing of Debtors' petitions.

Debtors' post-petition conduct demonstrates they recognized the common-law indemnity claim was a post-petition claim at the time the underlying lawsuit was commenced. The automatic stay bars claims that could have been commenced prior to the filing of a bankruptcy,

but does not apply to claims that arise after the filing of the case. 11 U.S.C. § 362(a)(1); In re Frenville Co., Inc., 744 F.2d at 335. Plaintiffs sought and Debtors agreed to relief from the stay solely for the purpose of permitting Plaintiffs to amend their Complaint to name Debtors as a party to the action and proceed to final judgment. (AA. p. A57.) Mrs. Martin was not a party to the Stipulation because her claim arose post-petition and was not barred by the stay. If Debtors, as the Trust now contends, thought the claim was a pre-petition claim, they would have sought to enforce the automatic stay at the time Mrs. Martin asserted her common-law indemnity claim (almost four years ago) or included it in the stipulation providing for relief from stay. The fact that the Debtors did not so act further shows Mrs. Martin's claim was a post-petition claim.

IV. THE BANKRUPTCY COURT INCORRECTLY HELD THAT MRS. MARTIN'S INDEMNIFICATION OBLIGATION AROSE FROM THE CONTRACT WITH DEBTORS.

The Bankruptcy Court recognized that In re Frenville controls, however, it signaled that the decision was "egregiously in error." (AA. p. A5.) The Bankruptcy Court attempted to sidestep this binding precedent by holding that Debtors' indemnification obligation was an implied-at-law term of the actual contract between Debtors and Mrs. Martin. (Id. at A9.) On that basis, the Court held that the indemnification claim arose at the time the rental agreement was executed – before the filing of the bankruptcy cases. (Id. at A9-A10.) The Bankruptcy Court's decision is erroneous. The Minnesota district court held that the claim arose under common-law, which must be given preclusive effect. Further, the Bankruptcy Court misapplied Minnesota law and effectively overruled controlling Third Circuit precedent.

A. The Minnesota District Court Held That Debtors' Liability To Ms. Martin Arose Under The Common-law, Which Precluded The Bankruptcy Court From Holding To The Contrary.

Federal courts must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466, 102 S. Ct. 1883, 1889 (1982) (quotation omitted). This principle is embodied in 28 U.S.C. § 1738. Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 40F 3d 1416, 1429 (3d 1994). Section 1738 provides that state court judgments “shall have the same full faith and credit in every court within the United States and its Territories and Possession as they have by law or usage in the courts of such State.” 28 U.S.C. § 1738.

“Congress has directed federal courts to look principally to state *law* in deciding what effect to give state-court judgments.” Lance v. Dennis, 546 U.S. 459, 126 S.Ct. 1198, 1202 (2006) (emphasis in original). Under Minnesota law, issue preclusion bars the same party or its privity from disputing a right, question, or fact previously determined. Kaiser v. Northern State Power Co., 353 N.W. 2d 899, 902 (Minn. 1984). Issue preclusion applies where:

(1) the issue was identical to the one in the prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Johnson v. Consolidated Freightways, Inc., 420 N.W. 2d 608, 613 (Minn. 1988).

Here, all of the elements exist. As recognized by the Bankruptcy Court, the nature of Mrs. Martin’s claim was decided by the Minnesota district court. (AA. p. A8.) (“[T]o settle this dispute the Court must look to the conclusions of the Minnesota Court to determine on what basis and when the indemnification claim arose.”). The Bankruptcy Court, however, misinterpreted that court’s orders, ostensibly overlooking the second order clarifying the first. In the second order, the Minnesota district court ordered Debtors to indemnify Ms. Martin pursuant to the “principles of indemnification.” (Id. at A77.) When Minnesota courts utilize the phrase “principles of indemnification,” they invoke the common-law. Zurich American Ins. Co. v. Bjelland, 710 N.W.2d 64, 67 (Minn. 2006) (holding right to indemnity in workers’ compensation

statute was more limited than common-law “principle of indemnity”); Haney v. International Harvester Co., 201 N.W.2d 140, 144 (Minn. 1972) (utilizing term “principles of indemnity and contribution” to describe numerous prior cases applying common-law); Allstate Insurance Co. v. Eagle-Picher Industries, Inc., 410 N.W.2d 324, 327-28 (Minn. 1987) (using term “principles of indemnity” to contrast common-law indemnity with workers’ compensation law); American Mut. Liability Ins. Co. v. Reed Cleaners, 122 N.W.2d 178, 182 (Minn. 1963) (employing common-law to describe “principle of indemnity”); Olson v. Blesener, 633 N.W.2d 544, 546-47 (Minn. Ct. App. 2001) (employing term “principle of indemnity” in reference to common-law description of indemnity). Moreover, as demonstrated above, this holding is in accordance with the Minnesota No-Fault Automobile Insurance Statute and established case law. Thus, the Minnesota district court held that Ms. Martin’s indemnity claim rose under Minnesota common-law.

This decision was a final order. It was rendered after the trial and post-trial briefing. Debtors were given a fair opportunity to be heard. They participated at the trial and submitted post-trial briefs. Debtors also had an opportunity to appeal the Minnesota district court’s decision.

Finally, there exists privity. A trust charged with administering the assets and liabilities of a debtor is in privity with that debtor. In re American Metrocomm Corp., 303 B.R. 32, 34 (Bankr. D. Del. 2000). Debtors, as debtors-in-possession, litigated the underlying dispute before the Minnesota district court. The Trust is charged with administering Debtors’ assets and claims under the confirmed plan. As such, the Trust is a party in privity with the Debtors.

In sum, the Minnesota district court already determined that Debtor's liability arose under Minnesota common-law. Pursuant to the issue preclusion doctrine, the Bankruptcy Court was precluded from finding that the claim arose under the rental agreement.

B. Minnesota's No-Fault Automobile Insurance Statute Does Not Imply An Indemnification Obligation Into The Rental Contract Between Debtors And Mrs. Martin.

The Bankruptcy Court's decision is premised on the assertion that the Minnesota No-Fault Automobile Insurance Statute "deems" a policy to exist between Debtors and Mrs. Martin indemnifying Mrs. Martin and that policy becomes an "implied at law term of the actual contract between the Debtors and Martin." (AA. p. A9.) Simply put, the statute does not so provide, and no Minnesota court has so held.

As described above, Minnesota courts employ the conceptual policy approach to determine whether the contract between a self-insured (such as Debtors) and another party is enforceable under the Minnesota No-Fault Automobile Insurance Statute. Hertz Corp., 573 N.W.2d at 689; McClain v. Begley, 465 N.W.2d 680, 682 (Minn. 1991). Under this approach, the courts treat the self-insurer as if it had purchased a policy of auto liability insurance naming itself as the insured and containing an omnibus liability clause extending coverage to unnamed permissive drivers. Hertz Corp., 573 N.W.2d at 689; McClain, 465 N.W.2d at 682.

"[A]n insurer's liability is governed by the contract between the parties *only as long a coverage required by law is not omitted and policy provisions do not contravene applicable statutes.*" Hertz Corp., 573 N.W. 2d at 690 (emphasis in original) (quoting Streich v. American Family Mut. Ins. Co., 358 N.W.2d 396, 399 (Minn. 1984)); see also American Family Mutual Ins. Co. v. Ryan, 330 N.W.2d 113, 115 (Minn. 1983) ("The well-settled general rule in the construction of insurance contracts, however, provides that parties are free to contract as a desire,

and so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes, the extent of the insurer's liability is governed by the contract entered into."'). If the contract conflicts with the Minnesota No-Fault Automobile Insurance Statute, it does not replace or infer a term into that contract; rather, the offending contractual provisions are unenforceable. Hertz Corp., 573 N.W.2d ("We conclude that the provision of the rental agreement purporting to limit Hertz' liability obligation to situations in which there is no other coverage, contravenes the No-Fault Act and is, therefore, unenforceable."); Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829, 833 (Minn. 1989) ("[C]ontract provisions which conflict with statutory law will not be enforced."').

Here, the provision of the rental agreement purporting to establish that Mrs. Martin's coverage was primary conflicted with the Minnesota No-Fault Automobile Insurance Statute, specifically the conceptual policy approach. Consequently, the provision was struck. The Minnesota No-Fault Automobile Insurance Statute did not substitute in its place a provision indemnifying Mrs. Martin. Indeed, no provision of that statute provides Mrs. Martin a right to indemnity. Rather, the statute only obligated Debtors to provide "primary" coverage. Debtors failed to provide primary coverage, and Mrs. Martin was forced to pay the judgment. This gave rise to a common-law claim of indemnity, which the Minnesota district court granted.

Thus, contrary to the Bankruptcy Court's holding, the Minnesota No-Fault Automobile Insurance Statute does not imply a term into the parties' contract that contradicts its express terms and did not previously exist.

C. Mrs. Martin And Debtors Did Not Specifically Agree In Advance To Indemnification As Required By The Third Circuit.

The Bankruptcy Court's holding that the indemnity obligation was a term of the actual contract between Debtors and Mrs. Martin contradicts the Third Circuit's definition of an

indemnity agreement and the terms of the rental agreement to which Debtors and Mrs. Martin agreed.

In Frenville, the Court contrasted when an indemnity claim arises under the common-law and under contract. The Court noted that to constitute an indemnity contract, the “parties must agree in advance that one party will indemnify the other.”⁷ In re Frenville, 744 F.2d at 337. In other words, the claim will only relate back in time to the agreement when the parties “specifically agree” as to indemnification in that agreement. Id.

Mrs. Martin and Debtors never specifically agreed that Debtors would indemnify her. Indeed, the only agreement between the parties – the rental agreement – provided that Mrs. Martin’s coverage was primary. Debtors maintained that this language controlled throughout the underlying case and, therefore, they asserted no obligation, including a contractual obligation, to indemnify Mrs. Martin existed. Not until the Minnesota district court entered the October 31, 2003 Order, did Debtors cease to maintain that Mrs. Martin had a contractual obligation to indemnify them.

Moreover, the Minnesota district court did not insert an obligation to indemnify Mrs. Martin into the rental agreement under the conceptual policy approach. (AA. p. A75.) The court merely hypothesized that Debtors had purchased a policy naming themselves as insureds. (Id.) That imagined policy was not a part of the rental agreement. It is a separate and distinct

⁷ This requirement is consistent with the definition of contingent claims: “obligations that will become due upon the happening of a future event that was ‘within the actual or presumed contemplation of the parties at the time the original relationship was created.’” In re Chateauguay Corp., 945 F.2d 1205, 1208 (2d. Cir. 1991) (quoting In re All Media Properties, Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980); see also In re Frenville, 744 F.2d at 337, n.7. Although unmaturing, contingent claims are claims for purposes of section 101(5).

contract (albeit existing only hypothetically) between Debtors and their conceptualized insurer under which Mrs. Martin was only an “unnamed” permissive user. (*Id.*)

D. The Bankruptcy Court’s Decision Effectively Overrules Binding Precedent.

The Bankruptcy Court recognized that it “cannot overrule Frenville and is bound by its holding.” (*Id.* at A5.) However, by holding that an indemnification obligation that is implied-at-law arises at the time the parties enter into any agreement, the Bankruptcy Court did just that.

“Indemnity is generally said to rest upon contract, either express or implied.” Hendrickson v. Minnesota Power & Light Company, 104 N.W.2d 843, 847 (Minn. 1960) overruled in part on other grounds Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362 (Minn. 1977); see also 42 C.J.S. Indemnity § 3 (June 2004) (“Generally, in the absence of an express or implied contract a right to indemnity cannot be claimed.”). Common-law indemnity exists only in the absence of an express agreement. Art Goebel, Inc. v. North Suburban Agencies, Inc., 567 N.W.2d 511, 516 (Minn. 1997). Thus, by its very nature, common-law indemnity is always implied-at-law. Schuler v. Meschke, 453 N.W.2d 156, 164 (Minn. Ct. App. 1989).

In Frenville, the parties entered into a pre-petition agreement whereby the accountant would provide services to the debtor. 744 F.2d at 333. The court, however, noted that there was “no indemnity agreement” between the parties. *Id.* at 337. Thus, the court held that the common-law indemnity claim (which had to be implied-at-law) arose at the time the judgment was paid or, at the earliest, when the underlying suit was commenced. *Id.* at 338.

The Bankruptcy Court’s holding effectively overrules this decision. The Bankruptcy Court’s Opinion stands for the proposition that, when liability rests on a common-law claim and there exists any agreement between the parties, even one that bars such indemnity, the common-law indemnity claim is implied into the contract. This holding runs afoul of Frenville,

in which the court did not imply the common-law right of indemnification into the agreement, even though that agreement was silent on the subject of indemnity.

V. MRS. MARTIN’S INDEMNITY CLAIM IS AN ACTUAL, NECESSARY COST AND EXPENSE OF PRESERVING DEBTORS’ ESTATES.

Having incorrectly held that Mrs. Martin’s claim arose pre-petition, the Bankruptcy Court did not address whether the claim is an actual, necessary cost and expense of preserving the bankruptcy estate under 11 U.S.C. § 503(b)(1)(A). Mrs. Martin’s claim is such an expense.

The Supreme Court has held that an actual, necessary cost and expense of preserving the bankruptcy estate includes expenses “ordinarily incident to operation of a business, and are not limited to costs without which rehabilitation would be impossible.” Reading Co. v. Brown, 391 U.S. 471, 483 (1968). Accordingly, the Supreme Court held that a tort claim was an actual, necessary cost and expense under section 503. Id. at 485.

The Supreme Court’s holding was based upon two principles. First, “fairness to all persons having claims against the insolvent” mandated that post-petition tort claims, which arise post-petition by operation of the law, be accorded priority status. Reading Co., 391 U.S. at 477. Second, post-petition obligations of a bankruptcy estate should be imposed on the party who should bear the cost of purchasing insurance, and the injured party should enjoy the same priority as the expense for insurance premiums. Id. at 483.

Mrs. Martin’s indemnity claim is not a tort claim; it is an “equitable claim.” In re Estate of Morse, 364 N.W.2d 842, 843 (Minn. Ct. App. 1985). Nonetheless, the same principles upon which the Supreme Court based its holding apply. The Supreme Court based its holding in Reading Co. on the fact that it was “equitable” and here Mrs. Martin’s common-law indemnity claim is, in fact, an equitable claim. Moreover, Mrs. Martin’s equitable claim arose because she satisfied Plaintiffs’ tort claim against Debtors.

The post-petition equitable obligation should also be imposed on Debtors because they are the parties who had the opportunity to purchase insurance post-petition. The payment of this expense would have been entitled to priority treatment under section 503 and that policy would provide coverage for Mrs. Martin's claim. The fact that Debtors chose not to purchase such insurance should not relegate Mrs. Martin's indemnity claim to a general unsecured claim. Instead, she should enjoy the same priority status as the expense for insurance premiums. This principle is especially pertinent here because Mrs. Martin's equitable claim arose from Debtor's failure to meet the statutory requirements of Minnesota's No-Fault Automobile Insurance Statute.

If Mrs. Martin's claim is not given priority treatment, Debtors will have successfully imposed upon Mrs. Martin their responsibility in contravention of both the Minnesota No-Fault Automobile Insurance Statute and the Minnesota district court's interpretation of Minnesota law. Thus, Mrs. Martin's claim is an actual, necessary expense and cost of preserving the estate. As such, it is an allowed administrative expense.

CONCLUSION

Mrs. Martin respectfully requests that this Court reverse the Bankruptcy Court's Opinion, allow Mrs. Martin's administrative claim in the amount of \$2.44 million under 11 U.S.C. § 503, and order the Debtors and Trust to immediately pay that claim.

Dated: January 25, 2007



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U.S. DISTRICT COURT FOR THE DISTRICT OF DELAWARE
Appeal from the U.S. Bankruptcy Court
For the District of Delaware

Marjorie Joan Martin,

Appellant,

v.

ANC Rental Corporation,

Appellee.

Appeal Case No. 1:06-cv-389

CERTIFICATE OF SERVICE

I, James S. Yoder, Esquire, do hereby certify that a true and correct copy of the **Appellant Marjorie Joan Martin's Opening Brief and Appendix** to be made on January 25, 2007, to the following party via first class mail:

William J. Burnett, Esq.
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U.S. DISTRICT COURT FOR THE DISTRICT OF DELAWARE
Appeal from the U.S. Bankruptcy Court
For the District of Delaware

Marjorie Joan Martin,

Appellant,

Appeal Case No. 1:06-cv-389

v.

ANC Rental Corporation,

Appellee.

**APPELLANT MARJORIE JOAN MARTIN'S SEPARATE APPENDIX TO OPENING
BRIEF**

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APPENDIX

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

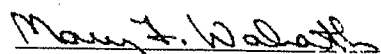
IN RE:) Chapter 11
)
ANC RENTAL CORPORATION, INC.,) Case No. 01-11200 (MFW)
et al.,)
) (Jointly Administered)
) Debtors.)
_____)

O R D E R

AND NOW, this 28th day of APRIL, 2006, upon consideration of the Motion of Marjorie Joan Martin for Allowance and Immediate Payment of Administrative Claim and the response of the Trust thereto, and for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Motion is DENIED.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: James S. Yoder, Esquire¹

¹ Counsel is to serve a copy of this Opinion and Order on all interested parties and file a Certificate of Service with the Court.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	Chapter 11
)	
ANC RENTAL CORPORATION, INC.,)	Case No. 01-11200 (MFW)
et al.,)	
)	(Jointly Administered)
Debtors.)	
)	

MEMORANDUM OPINION¹

This matter is before the Court on the Motion of Marjorie Joan Martin ("Martin") for Allowance and Immediate Payment of Administrative Claim (the "Motion"). The Liquidating Trust of ANC Rental Corporation, Inc. (the "Trust") opposes the Motion. For the reasons set forth below, the Court will deny the Motion.

I. BACKGROUND

On November 13, 2001, ANC Rental Corporation, Inc. ("ANC") and Alamo Rent-A-Car, LLC ("Alamo") (collectively "the Debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code together with several other subsidiaries. Prior to the filing, on July 1, 2001, Martin rented a car from Alamo. On July 14, 2001, while driving the rental car, Martin was involved in an accident in Minnesota with another vehicle. The occupants of the other vehicle were seriously injured, two fatally.

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

Post-petition, on or about April 10, 2002, representatives of the other parties to the accident (the "Plaintiffs") filed suit in Minnesota against Martin. In April 2003, the Debtors stipulated to relief from the stay to permit the Plaintiffs to name the Debtors as defendants in the Minnesota suit. As a result, the Plaintiffs filed an amended complaint against Martin and the Debtors. Martin and the Debtors answered the amended complaint and filed cross-claims against each other for indemnity.

On September 24, 2003, after trial, the jury returned a \$2.5 million verdict in favor of the Plaintiffs, finding Martin and the Debtors jointly and severally liable. On October 31, 2003, the Minnesota Court held that the Debtors were liable to Martin for indemnity and dismissed the Debtors' cross-claim against Martin.

In January 2004, Martin paid the Plaintiffs \$2.44 million in full settlement of the judgment. On March 12, 2004, Martin filed an administrative claim in the Debtors' bankruptcy cases in that same amount. On March 24, 2006, Martin filed the instant Motion for allowance and payment of that administrative claim.

In the interim, this Court confirmed the Debtors' Plan of Reorganization on April 15, 2004. The Trust is authorized to object to claims and to make distributions to creditors pursuant to the Plan. The Trust filed an objection to Martin's Motion on

April 20, 2006, and a hearing was held on the Motion on April 24, 2006. After hearing oral argument the Court took the matter under advisement.

II. JURISDICTION

This Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334 & § 157(b) (1), (b) (2) (A), (B), & (O).

III. DISCUSSION

Martin asserts that she has a post-petition administrative claim for indemnity against the Debtors under In re M. Frenville Co., 744 F.2d 334 (3d Cir. 1984), which held that a common law indemnity claim arose post-petition when the movant was sued, not pre-petition when the debtor's allegedly fraudulent acts occurred.

The Trust asserts that Frenville is not applicable and should, at any rate, be overruled. The Court, of course, cannot overrule Frenville and is bound by its holding. Bankruptcy courts "are bound by the law of their own circuit. . . . They are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be." See Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981) (citations omitted).

Frenville instructs the Court to ascertain when the claim arose under state law, that is, "at what point [the claimant] has a 'right to payment' for its claim for indemnification." 744 F.2d at 335. In Frenville, New York common law provided that a claim for indemnity did not arise when the fraudulent acts occurred but only when suit was filed. In performing its analysis, however, the Third Circuit acknowledged that

The present case is different from one involving an indemnity or surety contract. When parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, there exists a right to payment, albeit contingent, upon the signing of the agreement.

Id. at 336. See also In re Pinnacle Brands, Inc., 259 B.R. 46, 50-51 (Bankr. D. Del. 2001) (holding that indemnification claim based on contract executed pre-petition was a pre-petition claim); In re Mid-American Waste Systems, Inc., 228 B.R. 816, 821-22 (Bankr. D. Del. 1999) (holding that indemnification claim arising under debtor's certificate of incorporation for pre-petition actions of debtor's officers was pre-petition claim); In re Pennsylvania Truck Lines, Inc., 189 B.R. 331, 334 (Bankr. E.D. Pa. 1995) (concluding that claim for indemnity under pre-petition contract was a pre-petition claim under Frenville).

The Trust argues that this case is distinguishable from the facts of Frenville and fits within the exception noted by Frenville: that contract claims for indemnity arise when the contract is signed, not when the underlying cause of action

accrues. 744 F.2d at 336. The Trust asserts that in this case Martin's claim for indemnity arises under statute, not under common law, and asserts that the statute supports its argument. The Trust cites to the portion of the Minnesota statute which provides that "[w]henever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof." Minn. Stat. § 170.54 [renumbered § 169.09, subd. 5a]. The Trust argues, therefore, that Martin's indemnification rights arose when she signed the car rental agreement, which is the applicable contract. Because Martin signed the contract pre-petition, the Trust contends that Martin has only a pre-petition claim.

Martin responds that her indemnity claim does not arise under the section cited by the Trust but instead arises under Minn. Stat. § 65B.49, subd. 5a(i)(2). The latter section caps the vicarious liability that a car rental agency otherwise has under Minnesota law so long as it has "in effect, at the time of the accident, a policy of insurance or self-insurance" that meets certain statutory requirements. Id. According to Martin, it was not until the Minnesota Court determined that the Debtors had not complied with the statutory requirements that Martin's claim for indemnity arose.

To settle this dispute the Court must look to the conclusions of the Minnesota Court to determine on what basis and when the indemnification claim arose. It is true, as the Trust contends, that the Minnesota Court concluded that the Debtors were vicariously liable for the negligence of Martin under Minn. Stat. § 170.54 [renumbered § 169.09, subd. 5a]. (See Order dated September 24, 2003, at Findings of Fact ¶ 2.) However, that was the basis for its conclusion that the Debtors were liable to the Plaintiffs, not to Martin. (Id. at Conclusions of Law ¶ 1.)

The issue of who (between the Debtors and Martin) would be primarily liable was addressed by the Minnesota Court in its October 31, 2003, ruling. In that Order, the Minnesota Court found that the Debtors had not complied with the self-insurance requirements of the Minnesota Statute. (See October 31, 2003, Order at Findings of Fact ¶ 5.) As a result, the Court concluded that the Debtors were primarily liable (and owed an indemnification obligation to Martin). That decision was founded on Minnesota case law. See, e.g., Hertz Corp. v. State Farm Mut. Ins. Co., 573 N.W.2d 686 (Minn. 1998). The Court in Hertz held that: "A self-insured car rental agency does not meet its obligations as an automobile owner under the No-Fault Act by thrusting upon the renter its responsibility to provide liability coverage - that is, by providing liability coverage only in the event that the renter is without liability coverage." Id. at

688-89. Thus, the Hertz Court held that an agreement restricting the car rental agency's liability was unenforceable as against public policy and that, as the owner of the vehicle, the car rental agency was primarily liable for the damages caused by the renter's accident. Id.

Because the Debtors had not complied with the Minnesota statute, the Minnesota Court similarly held that the Debtors' insurance coverage was primary - that is, the Debtors were primarily liable, before Martin, for payment of the Plaintiffs' injuries. (See October 31, 2003, Order at Conclusions of Law ¶ 5.) Accordingly, the Minnesota Court concluded that the Debtors would be treated as a self-insured entity with no cap and with a policy providing for indemnification for the driver, Martin. Id.

Based on the conclusions of the Minnesota Court, the Court must conclude that Martin's claim is a pre-petition claim. The premise of the Minnesota Court's decision is that the Debtors must be deemed to have a contract of indemnity with Martin that has no cap. Id. In other words, the indemnification obligation was an implied-at-law term of the actual contract between the Debtors and Martin. Therefore, the Debtors' obligation to indemnify Martin arose when the contract arose, i.e., when the car rental agreement was executed. Because the car rental agreement was executed pre-petition, the indemnification

obligation similarly arose pre-petition. Frenville, 744 F.2d at 336.

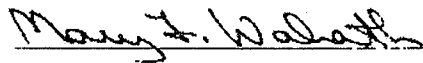
IV. CONCLUSION

For the foregoing reasons, the Court will deny the Motion of Marjorie Joan Martin for Allowance and Immediate Payment of Administrative Claim.

An appropriate order is attached.

BY THE COURT:

Dated: April 28, 2006



Mary F. Walrath
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-11200 (MFW)
. .
ANC RENTAL CORPORATION, .
et al., . 824 Market Street
. Wilmington, Delaware 19801
. .
Debtor. . April 24, 2006
. 2:00 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Flaster Greenberg, P.C.
By: WILLIAM J. BURNETT, ESQ.
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1 THE COURT: Good afternoon.

2 MR. BURNETT: Good afternoon, Your Honor. William
3 Burnett, Flaster Greenberg on behalf of the ANC Liquidating
4 Trust. I'm here with my colleague, Colleen Garrity, and also
5 on the phone, I believe, is Bob Stitch who is counsel to
6 Vanguard. He is a member in good standing in the state of
7 Minnesota and I have not filed a pro hoc for him but I would
8 like to be able to do so.

9 THE COURT: All right.

10 MR. BURNETT: I don't know if he's going to actually
11 speak but he wanted to participate.

12 THE COURT: All right. I will allow him to.

13 MR. BURNETT: Thank you, Your Honor. With respect to
14 the agenda for this afternoon, all the matters are continued
15 except for one matter. It's 1 through 11 listed on the agenda
16 as continued and the only matter going forward is Item No. 12
17 which is the motion of Marjorie Joan Martin for an allowance of
18 a payment of an administrative claim. I yield the podium to
19 counsel to the movant.

20 THE COURT: Thank you.

21 MR. YODER: Good afternoon, Your Honor. May it
22 please the Court, James Yoder on behalf of movant, Marjorie
23 Joan Martin. This is Ms. Martin's motion for an allowance of
24 immediate payment of an administrative claim in the amount of
25 \$2.44 million. This claim arises from a -- well, initially

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1 there was a motor vehicle accident pre-petition involving Ms.
2 Martin as the driver of a rental car, an Alamo ANC rental car.
3 Post-petition, the aggrieved party in the motor vehicle
4 accident sued -- well, the estate for the aggrieved party, sued
5 Ms. Martin and that was in April of '02. In April of '03, the
6 debtor stipulated with the plaintiff's estate to lift the
7 automatic stay to the extent of applicable insurance coverage.
8 And in the event there was any amount of a claim that exceeded
9 insurance, there would be an unsecured liquidated claim against
10 the estate.

11 Subsequently, thereafter, also in April of '03, the
12 Nibbs (phonetic) estate sued ANC Alamo and both Martin and ANC
13 cross claimed against each other for cross claim common law
14 indemnity. In August of '03, a jury awarded \$2.5 million in
15 Minnesota State Court against Martin, Alamo ANC jointly and
16 severally. In its findings of fact and conclusion of law dated
17 October 31, '03, the Minnesota District Court found that by
18 failing to meet its statutory requirements, ANC Alamo, under --
19 well, under the no-fault statute, ANC Alamo is deemed to be a
20 self insurer with uncapped liability limits and it also -- the
21 District Court also found that Martin was an insured under the
22 self-insured scheme and that Martin was fully covered for the
23 claims by the plaintiff's estate and that the indemnity clause
24 of the -- or Martin was indemnified by ANC Alamo for the full
25 extent of the losses and ANC Alamo's competing indemnity claim

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1 against Martin was dismissed.

2 In January of '04, the Nibbs estate and Martin agreed
3 to settle the case for \$2.44 million which is the amount at
4 issue today. On March 12th of '04, Martin filed a timely
5 administrative -- claim for administrative expenses for the
6 \$2.44 million and this is Martin's motion for enforcement.

7 The motion is governed by the Bankruptcy Code at
8 Section 503(b). 503(b)(a) provides that the claim for
9 administrative expenses must arise from post-petition events
10 and it's Martin's contention that this claim has arisen
11 post-petition because the operative date is not the date of the
12 motor vehicle accident or of the rental agreement but rather
13 for the date when the right to payment arose as provided in the
14 Third Circuit case, the Frenville case that is cited in the
15 papers. And taking a look at Frenville and also with Minnesota
16 Civil Procedure, it's Martin's position that the right to claim
17 arose at earliest when they were completing cross claims made
18 for common law indemnity in April of '03 which, of course, is a
19 prepetition event.

20 THE COURT: Well, is it pre or post-petition?

21 MR. YODER: Post-petition. Thank you.

22 THE COURT: Thank you.

23 MR. YODER: Now, I know that in opposing party's
24 papers, there's an argument that Martin is estopped from
25 seeking administrative expense claim on the virtue of the

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1 language of the stay, lift stay stipulation, providing for
2 pre-petition unsecured liquidated status for any claim in
3 excess of insurance coverage or not governed by insurance
4 coverage. I would like to rephrase it. But it's Martin's
5 position that the entire claim is covered by self insurance as
6 provided by the Minnesota State Court in its October 31, '03
7 order and in plaintiff's own -- or in the estate's own papers
8 at Page 3, Note 1. They cite Minnesota authority for the
9 proposition that self-insurance under the Minnesota law is the
10 functional equivalent of commercial insurance. So there's no
11 basis for an estoppel if there's full insurance coverage for
12 the claim.

13 The next prong of --

14 THE COURT: Well, was Mr. Martin a party to the
15 stipulation for relief from stay?

16 MR. YODER: Well, no, but if it's not -- it's at
17 least law of the case.

18 THE COURT: All right.

19 MR. YODER: The next element of the analysis is
20 Section 503(b)(b) of the Bankruptcy Code and it's relating to
21 the requirement that the claim for administrative expenses must
22 rise out of some activity has benefitted the estate
23 post-petition and the case cited by both parties is the Reading
24 v. Brown case, the U.S. Supreme Court case from 1968, which
25 provides that tort claims arising out of the administration of

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1 the estate are actual and necessary expenses and are deemed to
2 be administrative expenses.

3 Now, the Redding case does relate to a motor vehicle
4 accident that occurred post-petition but our case is not a tort
5 case but it is analogous to a court case. It's a case arising
6 in equity on the common law principles. It's an equitable
7 claim for common law indemnification. And that claim arises
8 post-petition because it was, as I said earlier, given rise to
9 by the post-petition competing cross claims at the earliest if
10 not by the October 31, 2003 order of the Court awarding the
11 indemnity in favor of Martin and dismissing the indemnity claim
12 of the estate.

13 Now, the basis of the Reed case which is analogous to
14 the instant matter for allowing post-petition tort obligations
15 to be considered administrative claims is, one, was fairness to
16 the parties who were involved in the pertinent activities of
17 the estate that give rise to whatever operation of law has --
18 is the basis for the claim and, second, that the post-petition
19 obligation of the estate should be imposed on the party who
20 should have borne the cost of purchasing insurance. And I
21 think those two requirements are met in this case.

22 The estate entered into a stipulation to lift stay
23 with the Nibbs estate and it -- well, the bankruptcy estate --
24 and the plaintiff's estate entered into the stipulation to lift
25 stay where the bankruptcy estate had knowledge that there is a

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1 claim against both Martin and then there will be a claim
2 against ANC Alamo arising from the personal injury or wrongful
3 death claims and that the ANC Alamo elected to defend and rely
4 on the fact that it had completing indemnity claims against
5 Martin and other defenses. And they lost in state court and
6 they rolled the dice and it's only fair now that they be held
7 to the post-petition operation of law of the state court
8 imposing the ultimate liability squarely on the part of ANC and
9 Alamo.

10 And, again, since the Minnesota court deemed ANC
11 Alamo to be a self insured under the Minnesota no-fault
12 statutory scheme, the second prong of 503(b)(b) is met because
13 ANC Alamo is thereby the party who should bear the insurance
14 burden in this particular instance.

15 There are two other points I would like to address
16 briefly in opposing counsel's papers. One is that the
17 Frenville case should be overruled. I mean, that's just not
18 possible here. That's left for another day. And similarly the
19 argument about Vanguard really being responsible, not ANC
20 Alamo, is not of immediate consequence to this motion. If they
21 have -- if ANC Alamo has indemnity rights against Vanguard, you
22 know, they will have the opportunity to enforce them but that
23 has no effect on the indemnity rights of Martin against ANC
24 Alamo.

25 THE COURT: All right. Thank you.

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1 MR. BURNETT: Good afternoon again, Your Honor.
2 William Burnett for the ANC liquidating trust.

3 Your Honor, we have several objections to the motion.
4 First, just to give a little bit of a background, ANC filed
5 their petitions for a Chapter 11 on November 13th of 2001. At
6 the time, there were well over 10,000 personal injury claims in
7 this case and the Martin and Nibbs accident was just one of
8 them. Martin rented a car from ANC in July of 2001 and the
9 accident occurred July 14, 2001. Martin is not entitled to an
10 administrative claim and Martin has not cited any legal or
11 equitable basis to elevate its pre-petition claim to
12 administrative status. And I'll go through the --

13 THE COURT: Well, don't you think Frenville applies?

14 MR. BURNETT: Well, I'll go through that.

15 THE COURT: All right.

16 MR. BURNETT: I mean, no. I think that it's
17 distinguishable for a few reasons. Firstly, the claim is
18 totally based on a pre-petition accident. The Nibbs, who are
19 the injured party, instituted suit and they believe they needed
20 stay relief to sue the debtors. Martin paid the judgment first
21 and that's part of the basis of their claim. If Martin had not
22 paid it first, clearly the same accident would undoubtedly be a
23 pre-petition claim alone. Frenville --

24 THE COURT: Well, their claim against you, the
25 debtor, is a -- the plaintiff's claim against the debtor is

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1 pre-petition but why, under Frenville, isn't the
2 indemnification claim?

3 MR. BURNETT: Well, Your Honor, the primary
4 distinguishing feature between Frenville and the current
5 situation is the statutory scheme under which the claim is
6 based, the Martin claim is based. The Martin claim is based on
7 the vicarious liability statute contained in Minnesota law
8 which is what enables Martin to be able to sue ANC, which is --
9 and when they entered into this rental agreement in July of
10 2001 pre-petition, they were signing on as a car renter under
11 the Minnesota statutory scheme. It's very similar to the
12 situation in Pinnacle where this Court found that a contractual
13 asset purchase agreement which contained an indemnification
14 clause gave rise to a contingent right to payment that had not
15 been actually actualized until the later damage occurred, which
16 was post-petition in that particular case.

17 THE COURT: Well, Frenville itself distinguished
18 between contractual indemnification provisions and
19 non-contractual, or common law. Why is this not more similar
20 to the common law? It's by virtue of their relationship with
21 the debtor, though not a contractual one. There's no
22 contractual indemnification agreement in the car rental
23 agreement and that's not what they're asserting.

24 MR. BURNETT: Correct. But what they're doing is
25 they're basically taking a claim which is, at bottom, a

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1 pre-petition claim and they are transforming it into a
2 post-petition admin claim using the Frenville --

3 THE COURT: That's exactly what happened in Frenville
4 though. The underlying claim was clearly a pre-petition claim.
5 The indemnification was found not be pre-petition though.

6 MR. BURNETT: Correct and the indemnification in this
7 particular is grounded in a statute, not common law, and it's
8 our view that Frenville should be held to its exact holding
9 which determined that common law indemnification is what gives
10 rise to this. And it was actually in the context of a stay
11 relief case. It wasn't in the context of a 503(b)
12 administrative claim motion which there's other issues with
13 respect to 503 which I'll get to in a moment, Your Honor.

14 But in terms of just the pure distinction of
15 Frenville versus this case, we have a statutory scheme which
16 grounds the liability that Martin is relying on, the prosecuted
17 claim.

18 THE COURT: But the statute provides that the claim
19 only arises when the cross claim is filed. Isn't that true?

20 MR. BURNETT: Well, Your Honor, as I said, in our
21 view, it's very analogous to -- you could make the same
22 argument with respect to the facts in the Pinnacle case,
23 although I'm aware that Frenville did specifically carve out
24 contractual claims in its own ruling. It didn't deal with
25 statutory claims. But the same analogy holds true, which is

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1 that at the time that the car renter's agreement was entered
2 into, it was a contingent claim, or at least the accident date
3 of July 14, 2001, it was a contingent claim that Martin had
4 pursuant to this statute and that it hadn't, you know, given
5 rise yet, similar to Pinnacle, and therefore, you know, this
6 Court and the Frenville court acknowledged that there was, you
7 know, this contingent type of claim that would suffice it to be
8 pre-petition.

9 THE COURT: Well, but when does the indemnity claim
10 arise under Minnesota law? Is it when an agency contract is
11 signed?

12 MR. BURNETT: Well, Your Honor, I guess I keep going
13 back to the vicarious liability statute that is really the
14 basis upon which the indemnification claim arises.

15 THE COURT: And what does that say?

16 MR. BURNETT: The vicarious --

17 THE COURT: Yes.

18 MR. BURNETT: Your Honor, let me get it but I believe
19 it's at the time of the accident. Do you want me to cite the
20 actual statute?

21 THE COURT: Yes. Yes.

22 MR. BURNETT: One moment, Your Honor.

23 (Pause)

24 THE COURT: Would counsel on the phone please mute
25 your phone? Thank you.

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1 MR. STITCH: Yes. I'm here, Your Honor.

2 THE COURT: Okay. Could you push the mute button
3 because we're getting feedback.

4 MR. STITCH: Sorry about that.

5 THE COURT: Thank you.

6 MR. BURNETT: Your Honor, if you refer to Page 5 of
7 our objection, Paragraph 18, we cite the reference to Minnesota
8 statute which basically indicates whenever -- I'm just quoting
9 Section 170.54. "The act provides that whenever any motor
10 vehicle shall be operated within the state by any person other
11 than the owner with the consent of owner, express or implied,
12 the owner thereof shall, in case of accident, be deemed the
13 agent of the owner and the owner of such motor vehicle and the
14 operation of" -- basically, what it says is that the driver was
15 the agent for ANC and then ANC was liable under the statute
16 which really was -- it came directly applicable when this
17 accident. That law suit could have -- could have -- taken
18 place the day after that accident and the issue in Frenville is
19 the applicability of the automatic stay and the provisions of
20 362(a) as to whether a case could have been brought. And it is
21 our view that, based on the statutory scheme, that that claim
22 was fully ripe to be brought at the time of the accident.

23 As it turns out, that did not occur and that the
24 claim did not arise until afterwards because Martin happened to
25 pay the Nibbs or Walburg (phonetic) claim post-petition. But

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1 that's never been a determination in terms of a stay relief
2 argument. Just because somebody fails to bring a law suit
3 pre-petition doesn't make it so that the stay does not apply to
4 it. In other words, if you have a claim that's a pre-petition
5 claim, if you don't initiate a law suit, obviously the stay
6 would still apply to it. You couldn't --

7 THE COURT: The stay is really irrelevant to this,
8 isn't it? I mean --

9 MR. BURNETT: Well, understood. Your Honor, I go
10 back to the stay only because that is the basis of -- Frenville
11 was a stay relief case as opposed to, you know, an
12 administrative claim case.

13 THE COURT: Yes.

14 MR. BURNETT: But let me move on, Your Honor, because
15 I think that there -- even if Frenville does apply and that
16 this Court believes that it's a post-petition claim due to the
17 Frenville type reasoning, Frenville doesn't deal with 503(b).
18 It doesn't deal with the allowance of administrative claim.
19 And this Court actually, in Pinnacle, discussed this issue. It
20 may be it's a post-petition claim but it doesn't necessarily
21 mean it's an administrative claim under 503.

22 Martin, in their papers, points to the Reading v.
23 Brown case and a couple other cases thereafter which stand for
24 the general proposition that post-petition torts can give rise
25 to administrative claims and, of course, we wouldn't argue with

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1 that. In fact, there's been -- if you can imagine, there's been
2 thousands of post-petition torts that have happened against ANC
3 Rental. In fact, those were purchased and that liability was
4 assumed by Vanguard which I'll get to in a moment. But that
5 Reading v. Brown case isn't applicable here because, as we've
6 said, this is not a post-petition tort. In fact, they
7 acknowledge that it's an equitable claim.

8 So part of the issue here is how do you bridge the
9 gap between Reading and the 503(b) standards. How do you show
10 that there was a benefit to the estate in the same way that was
11 implicated? Like the Pinnacle case found, first you need a
12 post-petition transaction, which we contend that we don't have.
13 Second, you need to give benefit to the estate. And almost
14 exactly analogous to Pinnacle, in that case you were basically
15 trading one creditor for another, one creditor paying a
16 pre-petition claim and transferring it for a post-petition
17 claim. Here, you've got the Nibbs claim, or Walburg, depending
18 on how you look at it, would certainly be a pre-petition claim
19 under any analysis. And basically, by having Martin pay,
20 you're just transferring one for the other.

21 THE COURT: Yes, I know, but Frenville came to the
22 same conclusion. The pre-petition claim was a pre-petition
23 claim. However, the indemnity claim that was based on a
24 pre-petition claim was a post-petition claim, is what they
25 said, isn't it? I don't think the fact that you've converted it

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1 is really an argument.

2 MR. BURNETT: I understand, Your Honor. I mean, it's
3 our view that the only reason that it's really like a
4 contractual claim, statutory base, and that it gave rise
5 pre-petition.

6 THE COURT: I understand that.

7 MR. BURNETT: And that's what distinguishes it. And
8 the transferring of -- you know, I was just making the
9 arguments that are raised in Pinnacle which is that
10 transferring of one creditor for another.

11 A couple of other important things that I would like
12 to discuss. One is that Martin also makes an analogy to
13 payments by ANC of post-petition insurance and that any payment
14 of our insurance premiums would be administrative so why
15 shouldn't this payment be administrative. But that sort of
16 assumes that it's post-petition to begin with and I don't think
17 that solves the question. The question really is whether this
18 is a pre-petition claim or not.

19 I would like to turn to another important argument
20 which is the estoppel argument. The Walburg trustee, or the
21 Nibbs, after they filed their law suit, wanted to add ANC
22 Rental Corporation as a defendant in that law suit. They filed
23 a motion for relief from stay. The debtor objected and
24 eventually they entered into a stipulation. The stipulation
25 specifically provides that the stay of relief is granted only

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1 to the extent of applicable insurance and is not implicated, as
2 Martin tried to turn it, it's not -- it wasn't self insurance.
3 It was non-debtor property, third party insurance that was
4 allowed to go after because it's very clear that that's what
5 was intended by the stipulation because it says that no
6 enforcement should be had against any of the debtor's property.

7 THE COURT: Well, they're not violating the stay by
8 filing an administrative claim, are they? Why is that even
9 relevant?

10 MR. BURNETT: It's relevant because in that
11 stipulation, it specifically says that anything that's not
12 covered by insurance will be a pre-petition claim.

13 THE COURT: And that's the plaintiff's claim, not
14 Martin's claim.

15 MR. BURNETT: Right.

16 THE COURT: Martin wasn't a party to that
17 stipulation.

18 MR. BURNETT: Martin is not a party to the
19 stipulation. Martin was certainly aware. They were certainly
20 part of the law suit. They were aware that the stipulation is
21 happening. They didn't seek to preserve their administrative
22 claim as part of that stipulation.

23 THE COURT: But why would they have to?

24 MR. BURNETT: Well, I mean, I supposed that's the
25 issue but it's our view that if it was intended they were going

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1 to attempt to assert an administrative claim that it would have
2 to be included in that stipulation.

3 THE COURT: Why? They're not seeking an
4 administrative claim in the State Court. They properly filed a
5 claim in this court. Why would they need relief from the stay
6 for that?

7 MR. BURNETT: Well, Your Honor, they wouldn't need
8 relief from the stay but there's a specific provision in the
9 stipulation which indicates that anything that's not covered by
10 insurance would be a pre-petition claim. Now, Your Honor,
11 you're saying that they're not --

12 THE COURT: It doesn't deal with the Martin claim.

13 MR. BURNETT: Well, it's our view that it should have
14 and you're saying that it's not good enough because they
15 weren't a party to it.

16 THE COURT: Right.

17 MR. BURNETT: But it's our contention that it should
18 have and I think that that precludes them because they were --
19 they benefitted in a way that they knew about the stay relief
20 motion and they didn't seek to preserve that.

21 THE COURT: I don't --

22 MR. BURNETT: That's fine.

23 THE COURT: -- like that argument.

24 MR. BURNETT: That's fine. The last two points I
25 wanted to make are we certainly preserved our right to argue

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1 that Frenville should be overruled. I understand this Court
2 can't do that.

3 THE COURT: Right.

4 MR. BURNETT: But we wanted to have that in our
5 papers to the extent that we needed to do so. I don't expect
6 this Court to, you know, rule on that. It's just in our
7 papers.

8 THE COURT: Okay.

9 MR. BURNETT: And lastly we want to make the point
10 clear, in the first opportunity, that the estate itself --
11 whether this is a valid administrative claim or not, the State
12 itself cannot be liable for this administrative claim. There
13 is an asset purchase agreement between Vanguard and the estate
14 which clearly divided the world into pre-petition claims and
15 post-petition claims. And the premise of the entire sale was
16 that Vanguard would continue on with the operating business and
17 that it would assume the liabilities of the post-petition
18 personal injury claims. And the remaining estate was to pay
19 all the other creditors. And if creditors were able to sort of
20 back door their way into post-petition claims, this would
21 seriously undermine the asset purchase agreement in full.

22 THE COURT: How would it undermine the asset purchase
23 agreement?

24 MR. BURNETT: Well, it would essentially vicarate the
25 value of the -- the net value of the proceeds of the sale to

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1 benefit any other creditors because --

2 THE COURT: Well, any claim, any administrative
3 claim, would do the same.

4 MR. BURNETT: Absolutely but the concept between all
5 the parties was, and I think the documents, the asset purchase
6 agreement which was cited in the last couple of pages of our
7 objection, Page 11, Page 12, specifically detail how that
8 splitting of the world was to go and I can go through it if you
9 would like. But the idea was, is that because Vanguard is the
10 successor operator of the business, that they would pick up the
11 administrator burden of administrative type claims, which this
12 is deemed to be one and that the estate, the remaining estate,
13 the pot of money that deals with the claimant, would deal with
14 all the pre-petition claims and to administer all the -- you
15 know, all the claims objections and all the things that are
16 left behind. And so if you follow, you know, the Redding v.
17 Brown type analysis, basically Vanguard was taking the burden
18 of the, you know, parties that continued to do business the
19 debtor post-petition and assuming that liability, assuming that
20 administrative claim reliability. And the estate was leaving
21 behind the pre-petition claims and the pre-petition
22 administration.

23 THE COURT: Well, are you asking me to decide that if
24 there's an administrative claim that Vanguard is responsible
25 for it?

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1 MR. BURNETT: Well, Your Honor, it's certainly our
2 view that it's not an administrative claim. If you believe
3 that today is the day to make that determination, then we would
4 ask that you do that. If you think that it's for another day,
5 we wanted to make sure that the trust, the liquidating trust,
6 you know, is forthright with this Court in telling them that
7 even if we were to lose today, it is clearly not out view that
8 it is our burden to shoulder. And whether you believe it's
9 right, whether you think that we have to file another motion or
10 an adversary complaint against Vanguard to have them assume
11 that liability, that can be, you know, an open issue. But it's
12 certainly our contention that it is not our burden, even if
13 this were to be an administrative claim.

14 THE COURT: All right. Okay. I understand your
15 position. And your response?

16 MR. YODER: Just on one point, Your Honor. I believe
17 -- James Yoder on behalf of movant Martin again. I believe
18 there was reference made in opposing counsel's argument that
19 the claim was for indemnity was grounded in statute by the
20 vicarious liability statutory scheme under Minnesota law. But
21 if you look at the Hertz v. State Farm Supreme Court case that
22 is cited in the order of October 31, 2003 as the basis for the
23 Minnesota court's ruling against ANC Alamo, you'll see that at
24 Page 61, it clearly provides that the state's statutory scheme
25 does not preclude the common law claim for indemnity so they

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1 can exist. Whether or not there's some right under the
2 vicarious liability statute does not preempt or otherwise
3 preclude a claim for common law indemnity. Thank you.

4 THE COURT: Well, go back. Did the court, the
5 Minnesota court, find that this was common law liability?

6 MR. YODER: In the --

7 THE COURT: In its ruling.

8 MR. YODER: -- Martin case?

9 THE COURT: In the Martin case.

10 MR. YODER: In the Martin case, it was pled as common
11 law liability and it was -- in the order, it was reflected
12 simply as indemnity and it doesn't say that it was derived
13 expressly from a common law or from a statutory scheme. But
14 the pleadings which are attached to the papers, the claim that
15 was being -- the relief that was being sought was for common
16 law indemnity specifically.

17 THE COURT: Well, point out -- all right. It just
18 says, defendant Martin is to be indemnified by defendant, ANC
19 Alamo, to the full extent of any net judgment entered in this
20 matter.

21 MR. YODER: Yes. And then, if you look --

22 THE COURT: Binding five.

23 MR. YODER: Right.

24 (Pause)

25 MR. YODER: We look to -- I can't find the --

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1 THE COURT: Well, do you have a copy of the Hertz
2 decision by any chance?

3 MR. YODER: I do, Your Honor. Unfortunately, I only
4 have one copy. May I approach, Your Honor?

5 THE COURT: You may.

6 (Pause)

7 THE COURT: Thank you. Could counsel on the phone
8 please mute their phone?

9 MR. STITCH: I thought I had done that, Your Honor.
10 I'm sorry.

11 THE COURT: We're still hearing you.

12 (Pause)

13 MR. BURNETT: Your Honor?

14 THE COURT: Yes?

15 MR. BURNETT: May I interject at this point?

16 THE COURT: You may.

17 MR. BURNETT: It's our view that the Hertz v. State
18 Farm case that's being referenced and some of the language that
19 was cited as the underlying Martin orders refer to the no-fault
20 issue and as to whether there can be capped liability under the
21 Minnesota statutory scheme. But it doesn't go to the issue
22 that's important here which is the basis and genesis of the
23 indemnification claim. It's our understanding that actually
24 common law indemnification was not pled and we would like to
25 see that. We actually -- the answer wasn't included as part of

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1 the underlying motion. But in any event, the actual
2 indemnification claim is what's at issue here and the grounding
3 of that indemnification claim. That indemnification claim only
4 is possible because ANC is vicariously liable and the State
5 Court order does specifically say that, under Section 170.54,
6 it's the vicarious liability section is what grounds ANC's
7 liability and what was being litigated --

8 THE COURT: Where does it say that?

9 MR. BURNETT: Your Honor, there's a few state court
10 orders. I need to make sure that I'm looking at the same one
11 that you are.

12 THE COURT: I'm looking at the October 31, 2003
13 order.

14 MR. BURNETT: Your Honor, bear with me one moment,
15 please?

16 THE COURT: Yes. And I don't find --

17 MR. BURNETT: I think there's a subsequent order,
18 Your Honor.

19 MR. YODER: It's in February, the 10th of '04, I
20 believe. It doesn't really -- it relates to a clarification
21 regarding the Illinois priority policies.

22 THE COURT: Well, do I have that?

23 MR. YODER: Yes.

24 THE COURT: Where is it?

25 MR. YODER: It is Exhibit F, Your Honor.

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1 MR. BURNETT: Your Honor, I'm sorry. I also have --
2 and I apologize. There's just a lot of underlying state court
3 orders but there is also one dated September 24, 2003 which I
4 can hand up. And that specifically states that the -- it says
5 -- Findings of Fact by the Court, Paragraph 2, the parties
6 stipulated that the defendant, ANC Alamo, is vicariously liable
7 for the negligence of the defendant, Marjorie Martin, pursuant
8 to 170.54. And that's the September 24, 2003 order and I can
9 hand that up. And that's one of the exhibits from there. I
10 just don't know exactly --

11 THE COURT: It is?

12 MR. YODER: I don't see it in any of these papers.

13 (Pause)

14 MR. BURNETT: Your Honor, I'm not sure I see a
15 reference to that as an exhibit to theirs but to the extent
16 that that's relevant, I can certainly -- if the Court will
17 allow, I can get that admitted.

18 THE COURT: Any objection to that, me considering
19 that order?

20 MR. YODER: May I see it again?

21 MR. BURNETT: Your Honor, as a practical matter, I
22 know it was attached to the papers. I didn't get it from
23 elsewhere but I have to find out exactly where it came from.

24 (Pause)

25 MR. BURNETT: And, Your Honor, just to go to your

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1 other point, which was the October 31, 2003 order which you are
2 looking at, Paragraph 5 --

3 THE COURT: Yes.

4 MR. BURNETT: The reference to Minnesota statute
5 65(b).49, that's the no-fault section, that deals with the
6 capping of liability, not the indemnification issue. Are you
7 okay with this?

8 MR. YODER: Yes.

9 MR. BURNETT: Okay. Your Honor, may I hand this up?

10 THE COURT: Yes. Thank you.

11 (Pause)

12 THE COURT: All right.

13 MR. BURNETT: Your Honor, I have nothing to add
14 except for just to sort of -- my understanding of what was
15 happening in the underlying Minnesota case, and I defer to
16 Attorney Stich on the line if he wants to speak -- my
17 understanding of what occurred at that time and what was being
18 really litigated is the applicability of this self insured's
19 provisions which allowed a car rental company to cap their
20 liability if they satisfy certain obligations under the state
21 no-fault insurance. There wasn't a discussion regarding the
22 sources of indemnification or how the indemnification claim
23 arose but, whenever it came up at bottom, the Court found, and
24 the parties agreed, that the liability of ANC was based on this
25 vicarious liability statute which is provided in that Section

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1 170. And most of the other discussion was with respect to
2 sources of liability all centered around the applicability of
3 this no-fault cap and that's what that State Farm v. Hertz case
4 deals with.

5 THE COURT: All right.

6 MR. BURNETT: Thank you, Your Honor.

7 THE COURT: Any response?

8 MR. BURNETT: Nothing further, Your Honor.

9 THE COURT: All right. Let me take this matter under
10 advisement and look at the Hertz decision and the statutes.

11 MR. BURNETT: Thank you.

12 THE COURT: All right. We'll stand adjourned then.
13 Thank you.

14 * * * * *

C E R T I F I C A T I O N

I, Cecilia Ashbock, certify that the foregoing is a
correct transcript to the best of our ability, from the
electronic sound recording of the proceedings in the above-
entitled matter.

/s/ Cecilia Ashbock

Date: May 18, 2006

CECILIA ASHBOCK
J&J COURT TRANSCRIBERS, INC.

J&J COURT TRANSCRIBERS, INC.

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In Re:

Case No. 01-11200 (MFW)
Jointly Administered

ANC RENTAL CORPORATION, *et al.*

Debtor,

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Creditor Marjorie Joan Martin, pursuant to 28 U.S.C. § 158(a)(3) and Rule 8001 of the Federal Rules of Bankruptcy Procedure, hereby appeals to the United States District Court for the District of Delaware from the Order (D.I. #7865) and Memorandum Opinion (D.I. #7864) issued by the United States Bankruptcy Court for the District of Delaware on April 28, 2006, denying the Motion of Marjorie Joan Martin for Allowance and Immediate Payment of Administrative Expense Claim.

The parties and their counsel of record are:

Party

Creditor Marjorie Joan Martin

Counsel

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and
Clinton E. Cutler (#158094)
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(612) 492-7310 (phone)
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Debtors ANC Rental Corporation, et al. William J. Burnett, Esquire (#4078)
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Office of US Trustee Don A. Beskrone, Esquire (#4380)
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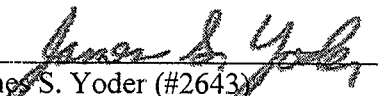
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Unsecured Creditors Committee Sean Matthew Beach, Esquire (#4070)
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WHITE AND WILLIAMS LLP

Dated: May 5, 2006

By:


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Attorneys for Creditor Marjorie Joan Martin

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:

Case No. 01-11200 (MFW)
Jointly Administered

ANC RENTAL CORPORATION, et al.

Debtor,

AFFIDAVIT OF LEE LA BORE

Lee La Bore, being first duly sworn upon oath, states as follows:

1. I am an attorney licensed to practice law in the State of Minnesota. I represent Ms. Marjorie Martin.
2. In July 2004, Marjorie Martin leased a car from Alamo Rent-A-Car, LLC ("Alamo").
3. On or about July 14, 2001, while driving the car leased from Alamo, Martin was involved in an accident in Dakota County, Minnesota with another vehicle in which Robert Lewis Nipp, Virginia Ida Nipp, and Andrew James Nipp were traveling. Robert Lewis Nipp and Virginia Ida Nipp were fatally injured and Andrew James Nipp suffered injuries to his leg, foot, head, and face. Martin suffered contusions, abrasions and other soft tissue injuries. She has also suffered psychologically from the trauma of the event.
4. Judith B. Wahlberg (the "Trustee" for the next of kin of Robert Lewis Nipp and Virginia Ida Nipp) and Andrew James Nipp commenced a suit against Martin on or about April 10, 2002 -- approximately five months after Debtors commenced these cases. Attached hereto as Exhibit A is a true and correct copy of the complaint.

5. Martin filed and served an answer denying liability and asserted a number of affirmative defenses. Attached hereto as Exhibit B is a true and correct copy of the answer.

6. On or about April 10, 2003, this Court entered an Order Approving Stipulation Granting Relief from the Automatic Stay. Attached hereto as Exhibit C is a true and correct copy of that order.

7. As a result, on or about April 25, 2003, Wahlberg and Andrew James Nipp filed and served an amended complaint naming Martin, Alamo, and ANC Rental Corporation as defendants. Attached hereto as Exhibit D is a true and correct copy of that amended complaint.

8. Martin filed and served an amended answer and cross-claim in which she denied liability and asserted a number of affirmative defenses and also asserted a cross-claim for common law indemnity against Alamo and ANC Rental Corporation.

9. Similarly, Alamo and ANC Rental Corporation denied liability and brought a cross-claim for common law indemnity against Martin.

10. On September 24, 2003, after a trial, the jury returned a \$2.5 million verdict in favor of the next of kin of Robert Lewis Nipp and Virginia Ida Nipp and found Alamo, ANC Rental Corporation, and Martin jointly and severally liable.

11. On October 31, 2003, the Minnesota district court found that by failing to meet the statutory requirements of Minn. Stat. § 65B.49 (Minnesota's No-Fault Automobile Insurance Statute), Alamo and ANC Rental Corporation became self-insured entities with uncapped liability. As a result, the Minnesota district court found that Martin was indemnified by Alamo and ANC Rental Corporation to the full extent of any net judgment entered in this matter. Moreover, the Minnesota district court dismissed Alamo's cross-claim for indemnity against Martin with prejudice. Attached hereto as Exhibit E is a true and correct copy of the October 31,

2003 order. Also attached hereto as Exhibit F is a true and correct copy of an order dated February 10, 2004 clarifying the October 31, 2003 order.

12. In January 2004, pursuant to a settlement agreement and release, Martin paid Wahlberg on behalf of the next of kin of Robert Lewis Nipp and Virginia Ida Nipp \$2.44 million in full settlement of the judgment. Attached hereto as Exhibit G is a true and correct copy of the settlement check.

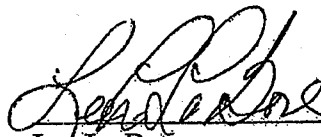
13. On or about January 30, 2004, this Court approved and ordered the dissemination of a Notice Requiring Filing of Administrative Claims in these cases. In conformance with such Notice, on March 12, 2004, Martin duly and timely filed a Proof of Administrative Claim in ANC Rental Corporation, et al., Case No. 01-11200, in the amount of \$2.44 million ("Administrative Claim"). Attached hereto as Exhibit H is a true and correct copy of that Administrative Claim.

14. In November 2005, the Motion of ANC Liquidating Trust for an Order Establishing Procedures for the Treatment of Certain Pre-Petition Personal Injury Claims was filed. Although that motion was not served on Martin, she responded by letter to ANC Liquidating Trust's counsel informing him that the claim was an administrative expense claim and it had been liquidated by final orders entered by the Minnesota district court. Attached as Exhibit I is a true and correct copy of that letter. The ANC Liquidating Trust has not responded.

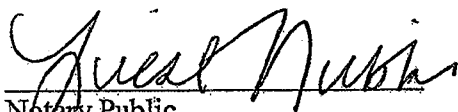
15. Martin has made repeated requests for payment of the Administrative Claim. However, to date, no disposition or payment of Martin's Administrative Claim has been made.

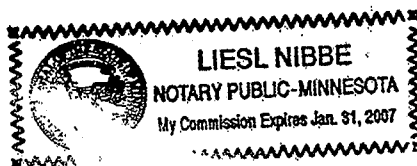
16. No prior requests for payment of such Administrative Claim, other than the original filing of the Proof of Administrative Claim, has been presented to this Court.

FURTHER AFFIANT SAYETH NOT.


Lee La Bore

Subscribed and sworn to before me
this 21 day of March, 2006.


Notary Public



#3243679\1

WOODBURY

MAY 3 2002

CLAIM SERVICE OFFICE
DISTRICT COURT

STATE OF MINNESOTA

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

SUMMONS

v.

Marjorie Joan Martin,

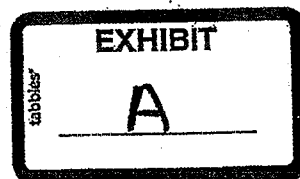
Defendant.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon plaintiffs' attorneys an Answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

You are advised that under Rule 114 of the General Rules of Practice for the District Courts, all civil cases are subject to Alternative Dispute Resolution (ADR) processes. Your attention is directed to the ADR options available under that rule.

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STATE FARM INS

WOODBURY

MAY 8 2002

CLAIM DENIAL OFFICE

Dated this 10th day of April, 2002.

ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.

By: Leo F. Feeney

Leo F. Feeney (#28599)

David J. Koob (#307282)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

05/15/02 WED 11:19 FAX 6517318062

STATE FARM INS

MAY 3 2002

CLAIM SECTION

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT
CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

COMPLAINT

v.

Marjorie Joan Martin,

Defendant.

Plaintiffs, for their Complaint and cause of action against the above-named defendant,
states and allege as follows:

PARTIES

I.

On October 5, 2001, Judith V. Wahlberg was appointed Trustee for the next of kin
of Robert Louis Nipp and Virginia Ida Nipp, decedents, by Order of the Honorable Donald J. Venne,
Judge of District Court, Tenth Judicial District, County of Anoka, State of Minnesota, a copy of
which Order is attached as Exhibit A. The action on behalf of the survivors of decedents is brought
by Judith V. Wahlberg, in her appointed capacity as Trustee, against the above-named defendant in
compliance with the Minnesota Wrongful Death Statute, Minn. Stat. §573.02, et seq. The action on
behalf of the minor plaintiff, Andrew James Nipp, is brought by his parent and natural guardian, Allan

J. Nipp.

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CLAIM SERVICE CENTER

II.

At all times herein material, decedents Robert Louis Nipp and Virginia Ida Nipp, husband and wife, were citizens and residents of Dakota County, residing at the time of their deaths at 710 Marie Avenue, Mendota Heights, MN 55118.

III.

At all times herein material, Allan J. Nipp was and is the father and natural guardian of minor plaintiff Andrew James Nipp (DOB 9/28/99), residing in Dakota County, at 8195 190th Street East, Hastings, MN 55033.

IV.

Upon information and belief, and at all times herein material, defendant Marjorie Joan Martin was a citizen and resident of Pima County, Arizona, residing at 7590 Via Los Arbusto, Tucson, AZ 85750.

V.

At all times herein material, Trustee Judith V. Wahlberg was and is a resident of Saint Louis County, residing at 5069 Country Road, Mountain Iron, MN 55768.

VI.

The next of kin of decedents Robert and Virginia Nipp, together with their ages and relationship to decedents, are as follows:

<u>Name</u>	<u>Age</u>	<u>Relationship</u>
Christine S. Kelley	49	Daughter
Cynthia J. Nipp	46	Daughter
Judith V. Wahlberg	42	Daughter
Jeffrey R. Nipp	40	Son
Allan J. Nipp	38	Son
Amy L. Nipp	35	Daughter

MAY 3 2002

CLAIM DENIED

FACTS

VII.

At all times herein material, Robert Louis Nipp was the owner and operator of a 1991 Ford Crown Victoria bearing Minnesota license plate EGX 778. At all times herein material, Virginia Ida Nipp, the wife of Robert Louis Nipp, was a passenger in the above-described motor vehicle. At all times herein material, Andrew James Nipp, the minor plaintiff and grandson of Robert and Virginia Nipp, was a passenger in the above-described motor vehicle.

VIII.

At all times herein material, defendant Marjorie Joan Martin was in possession of and operating a 2001 Chevrolet Malibu bearing Minnesota license plate GGR 759. At the time of the collision, the 2001 Chevrolet Malibu was leased by defendant Marjorie Joan Martin from Alamo Rent-A-Car, Inc., a Florida corporation. Upon information and belief, Alamo Rent-A-Car, Inc. was the registered owner of the vehicle being operated by defendant Marjorie Joan Martin at the time of the collision.

IX.

Upon information and belief, Alamo Rent-A-Car, Inc. engages in vehicle leasing services; i.e., providing vehicles for the public to lease, and, as part of its business, leased the above-described vehicle to defendant Marjorie Joan Martin from its business premises at the Minneapolis/St. Paul International Airport on July 14, 2001.

X.

At all times herein material, Interstate highway 35E was a duly dedicated public thoroughfare located within the city of Lino Lakes, county of Anoka, state of Minnesota. Said highway, as it proceeds through the above-described area, consists of two lanes of travel

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proceeding generally northbound and two lanes of travel proceeding generally southbound. A large, unpaved grass median separates the northbound and southbound lanes of travel.

GENERAL ALLEGATIONS

XI.

On July 14, 2001, at approximately 5:00 p.m., Robert Louis Nipp was lawfully operating his 1991 Ford Crown Victoria in a generally southbound direction upon Interstate 35E in the vicinity of Lino Lakes, Minnesota. At the same time and place, defendant Marjorie Joan Martin was operating her leased 2001 Chevrolet Malibu in a generally northbound direction upon Interstate 35E in the vicinity of Lino Lakes, MN. At the time and place described above, defendant's Chevrolet Malibu motor vehicle, traveling at a high rate of speed, suddenly bolted across the divider median and entered the southbound lanes of Interstate 35E, causing a collision with the Nipp vehicle at highway speeds. As a direct result of the foregoing high-speed collision, Robert Louis Nipp and Virginia Ida Nipp were fatally injured. The Nipp's grandson, Andrew James Nipp (DOB 9/28/99), a passenger in the Nipp vehicle, was taken by ambulance to North Memorial Medical Center and admitted for injuries to his left leg, foot, head and face. As a result of the accident, the minor child ceased ambulating and does not verbally communicate.

XII.

The fatal injuries sustained by Robert and Virginia Nipp were proximately caused by the negligence of defendant Marjorie Joan Martin. Consequently, the next-of-kin of Robert Louis Nipp and Virginia Ida Nipp have sustained a permanent and final loss of all elements of their ongoing relationship with their parents, including, but not limited to, the loss of their services, counseling and advice and other natural and normal losses flowing from the previously existing familial relationships including, but not limited to, loss of their care, comfort, society,

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WYOMING

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CLAIM DENIED

assistance and guidance, all to each heir's pecuniary damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000.00).

XIII.

As a direct result of the death of Robert Louis Nipp and Virginia Ida Nipp, proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, has been required to expend sums of money for medical bills, reasonable funeral and burial expenses and related items, all to her damage in a sum presently estimated to be in excess of Ten Thousand Dollars (\$10,000.00).

XIV.

As a direct result of the above-described collision and the negligence of defendant the minor plaintiff, Andrew James Nipp, has sustained injuries to his person which injuries, upon information and belief, are disabling and permanent, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

XV.

As a direct result of the trauma sustained by minor plaintiff Andrew James Nipp, proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, Allan J. Nipp, individually, and as father and natural guardian for Andrew James Nipp, has been required to expend sums of money for medical bills and related items, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

MAY 3 2002

CLAIM SERVICE OFFICE

NEGLIGENCE OF MARJORIE JOAN MARTIN

XVI

Plaintiffs Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, reallege and incorporate the above allegations by reference as set forth more fully below.

XVII

At the above-described time and place, defendant Marjorie Joan Martin negligently, carelessly and unlawfully operated the subject 2001 Chevrolet Malibu motor vehicle, causing a collision with the motor vehicle operated by Robert Louis Nipp. Illustrations of such negligent, careless and unlawful conduct of defendant Marjorie Joan Martin, cited by way of example, but not limitation, are the following:

- A. Defendant Marjorie Joan Martin failed and neglected to maintain the required degree of attention in her operation of the 2001 Chevrolet Malibu rental vehicle;
- B. Defendant Marjorie Joan Martin's inattentiveness resulted in her losing complete control of the 2001 Chevrolet Malibu rental vehicle;
- C. Defendant Marjorie Joan Martin was operating the 2001 Chevrolet Malibu rental vehicle at a speed in excess of the posted speed limit at the time of and prior to the subject occurrence;
- D. Defendant Marjorie Joan Martin failed and neglected to keep the 2001 Chevrolet Malibu rental vehicle on the proper side of the highway within its designated northbound lane of travel and otherwise failed to exercise due care in

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CLAIM SERVICE OFFICE

the operation of the vehicle, including her failing to operate said vehicle in accordance with the laws of the State of Minnesota, the rules of the road and in a generally responsible manner prior to the above-described occurrence; and defendant Marjorie Joan Martin was negligent, careless and unlawful in other ways too numerous to herein mention.

XVIII.

Defendant Marjorie Joan Martin committed the above-described negligent, careless and unlawful acts and omissions while operating a motor vehicle upon a public thoroughfare of the State of Minnesota. As a direct and proximate result of the above-described negligence, Robert Louis Nipp and Virginia Ida Nipp sustained fatal injuries which resulted in the damages alleged to the next of kin of Robert and Virginia Nipp.

XIX.

As a direct and proximate result of the above-described negligence of defendant, the minor plaintiff, Andrew James Nipp, sustained traumatic injuries to his person, which injuries have resulted in the alleged damages to the minor plaintiff and to Allan J. Nipp, his father and natural guardian.

WHEREFORE, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, prays for judgment against the defendant in an amount in excess of Fifty Thousand Dollars (\$50,000.00), together with costs and disbursements herein and reasonable attorneys' fees and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, prays for judgment against the defendant in an amount in excess of Fifty Thousand Dollars (\$50,000), together with costs and disbursements herein and reasonable attorneys' fees.

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CLAIM SERVICE OFFICE

Dated this 10th day of April, 2002.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: 

Leo F. Feeney (#285990)

David J. Koob (#307282)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

05/15/02 WED 11:22 FAX 6517318062

STATE FARM INS

WOODBURY

MAY 8 2002

CLAIMS SERVICE OFFICE

ACKNOWLEDGMENT REQUIRED BY
MINN. STAT. SEC. 549.211, SUBD. 2

The undersigned hereby acknowledges that, pursuant to Minn. Stat. Sec. 549.211, subd. 2, costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the Court.

Dated this 10th day of April, 2002.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Leo Feeney
Leo F. Feeney (#28599)
David J. Koob (#307282)2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

FILE NO.

Judith V. Wahlberg, as Trustee)
for the next of kin of Robert)
Louis Nipp and Virginia Ida Nipp)
decedents, and Allan J. Nipp, as)
the parent and natural guardian)
of the minor Plaintiff, Andrew)
James Nipp,)

Plaintiffs,)

vs.)

Marjorie Joan Martin,)

Defendant.)

ANSWER

* * * *

Comes now the Defendant, and for her Answer to the Complaint
of the Plaintiffs, states and alleges as follows:

I.

Denies each and every allegation contained in Plaintiffs'
Complaint, save and except as hereinafter qualified or admitted.

II.

That she is without sufficient information to judge the truth
or falsity of Plaintiffs' Complaint and as a result, puts the
Plaintiffs to the strict proof thereof.

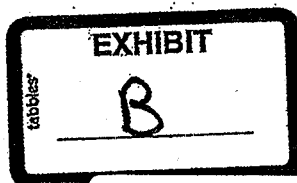
III.

Upon information and belief, admit paragraphs I, II, III,
IV, V, VI, VII, VIII, IX, and X of Plaintiffs' Complaint.

AFFIRMATIVE DEFENSES

IV.

As an affirmative defense the Defendant states that the



Plaintiffs have failed to state a cause of action for which relief can be granted.

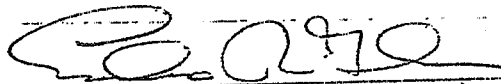
V.

As to the minor Plaintiff, Andrew James Nipp, the Defendant states that the Plaintiffs have failed to state a cause of action for which relief can be granted in that she has failed to fulfill a threshold requirement of Minnesota Statute §65B and related subdivisions therein.

IV.

WHEREFORE, the Defendant prays that the Plaintiffs take nothing by their pretended cause of action and that she be awarded her costs and disbursements herein.

LA-BORE, GIULIANI, COSGRIFF &
VILTOFT, LTD.



Steven L Viltoft (190615)
Attorney for Defendant
P. O. Box 70
Hopkins, Minnesota, 55343
(952) 933-3371

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded, pursuant to Minn. Stat. Sec. 549.21, Subd. 2, to the party against whom the allegations in this pleading are asserted.



Steven L. Viltoft

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA) SS:
COUNTY OF HENNEPIN)

Kimberly A. Eddy, of the City of Shorewood, County of Hennepin, State of Minnesota, being duly sworn, says that on the 17th day of May, 2002, she served Defendant's Answer on:

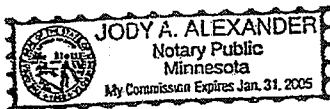
Leo Feeney, Esq.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402

in this action, by mailing to and depositing the same in the post office at Hopkins, Minnesota, directed to said attorney at his respective address as listed above, that being his last known mailing address.

Kimberly A. Eddy

Subscribed and sworn to before me
this 17th day of May, 2002.

Judy Albright
Notary Public



FILE No. 712 04/11 '03 09:05

FAX:

PAGE 3/ 3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

ANC RENTAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 01-11200 (MFW)
(Jointly Administered)

Re: Dkt. No. 4245

ORDER APPROVING STIPULATION
GRANTING RELIEF FROM AUTOMATIC STAY

Upon the Motion of Judith Wahlberg, as Trustee for the Next of Kin of Robert and Virginia Nipp, and Andrew James Nipp, a Minor, by and through His Parent and Natural Guardian, Allan Nipp ("Movants"), for Relief from stay Under Section 362 of the Bankruptcy Code [Docket No. 4245] (the "Motion").

And it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A);

And the above captioned Debtors' and Movants having entered into a stipulation granting relief from the automatic stay (the "Stipulation");

And it appearing that the relief requested in the Stipulation is in the best interests of the Debtors, their creditors and their estates;

And good and sufficient cause appearing therefore; it is hereby

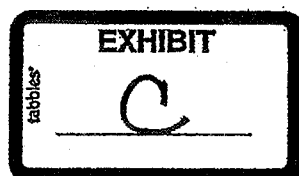
ORDERED that the Stipulation is granted and approved pursuant to the terms set forth therein.

Wilmington, Delaware

April 10, 2003

Mary F. Walrath
The Honorable Mary F. Walrath
United States Bankruptcy Judge

115586.01682940119102v1



STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

AMENDED SUMMONS

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon plaintiffs' attorneys an Answer to the Amended Complaint which is herewith served upon you, within twenty (20) days after service of this Amended Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Amended Complaint.

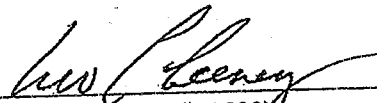
You are advised that under Rule 114 of the General Rules of Practice for the District Courts, all civil cases are subject to Alternative Dispute Resolution (ADR) processes. Your attention is directed to the ADR options available under that rule.

15060572.1



Dated this 25th day of April, 2003.

ROBINS, KAPLAN, MILLER & CRESI, L.L.P.

By: 
Leo F. Feeney (#28599)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

AMENDED COMPLAINT

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

Plaintiffs, for their Amended Complaint and cause of action against the above-named

defendants, states and allege as follows:

PARTIES

I.

On October 5, 2001, Judith V. Wahlberg was appointed Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, decedents, by Order of the Honorable Donald J. Venne, Judge of District Court, Tenth Judicial District, County of Anoka, State of Minnesota, a copy of which Order is attached as Exhibit A. The action on behalf of the survivors of decedents is brought by Judith V. Wahlberg, in her appointed capacity as Trustee, against the above-named defendant in compliance with the Minnesota Wrongful Death Statute, Minn. Stat. §573.02, et seq. The action on

15060572.1

behalf of the minor plaintiff, Andrew James Nipp, is brought by his parent and natural guardian,
Allan J. Nipp.

II.

At all times herein material, decedents Robert Louis Nipp and Virginia Ida Nipp, husband and wife, were citizens and residents of Dakota County, residing at the time of their deaths at 710 Marie Avenue, Mendota Heights, MN 55118.

III.

At all times herein material, Allan J. Nipp was and is the father and natural guardian of minor plaintiff Andrew James Nipp (DOB 9/28/99), residing in Dakota County, at 8195 190th Street East, Hastings, MN 55033.

IV.

Upon information and belief, and at all times herein material, defendant Marjorie Joan Martin was a citizen and resident of Pima County, Arizona, residing at 7590 Via Los Arbusto, Tucson, AZ 85750.

V.

At all times herein material, Trustee Judith V. Wahlberg was and is a resident of Saint Louis County, residing at 5069 Country Road, Mountain Iron, MN 55768.

VI.

The next of kin of decedents Robert and Virginia Nipp, together with their ages and relationship to decedents, are as follows:

<u>Name</u>	<u>Age</u>	<u>Relationship</u>
Christine S. Kelley	49	Daughter

Cynthia J. Nipp	46	Daughter
Judith V. Wahlberg	42	Daughter
Jeffrey R. Nipp	40	Son
Allan J. Nipp	38	Son
Amy L. Nipp	35	Daughter

VII.

At all times herein material, ANC Rental Corporation, a Delaware Corporation and its subsidiary Alamo Rent-A-Car, LLC operates one of the world's largest car rental businesses. On information and belief on July 14, 2001 Alamo, at its Minneapolis airport location, rented a Chevrolet Malibu to defendant Marjorie Joan Martin. On November 13, 2001, Defendant ANC Rental Corporation, and its subsidiary Alamo Rent-A Car, LLC filed a Chapter 11 Petition in U.S. Bankruptcy Court for the District of Delaware. In that action, Judith Wahlberg, as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and minor plaintiff Andrew Nipp, by and through his parent and natural guardian, Allan Nipp, are named as unsecured creditors.

On April 10, 2003 an Order signed by the Honorable Mary F. Wallrath, Judge, United States Bankruptcy Court for the District of Delaware, granted relief from the automatic bankruptcy stay allowing plaintiffs to amend their Complaint to add ANC Rental Corporation, and its subsidiary Alamo Rent-A-Car, LLC as a defendant to this action. This Amended Complaint is being brought under the authority of that Order, attached hereto as Exhibit B.

FACTS

VIII.

At all times herein material, Robert Louis Nipp was the owner and operator of a 1991 Ford Crown Victoria bearing Minnesota license plate EGX 778. At all times herein material, Virginia Ida Nipp, the wife of Robert Louis Nipp, was a passenger in the above-described motor vehicle. At all times herein material, Andrew James Nipp, the minor plaintiff and grandson of Robert and Virginia Nipp, was a passenger in the above-described motor vehicle.

IX.

At all times herein material, defendant Marjorie Joan Martin was in possession of and operating a 2001 Chevrolet Malibu bearing Minnesota license plate GGR 759. At the time of the collision, the 2001 Chevrolet Malibu was leased by defendant Marjorie Joan Martin from Alamo Rent-A-Car, LLC. Upon information and belief, Alamo Rent-A-Car, LLC was the registered owner of the vehicle being operated by defendant Marjorie Joan Martin at the time of the collision.

X.

Upon information and belief, Alamo Rent-A-Car, LLC engages in vehicle leasing services; i.e., providing vehicles for the public to lease, and, as part of its business, leased the above-described vehicle to defendant Marjorie Joan Martin from its business premises at the Minneapolis/St. Paul International Airport on July 14, 2001.

XI.

At all times herein material, Interstate highway 35E was a duly dedicated public

thoroughfare located within the city of Lino Lakes, county of Anoka, state of Minnesota. Said highway, as it proceeds through the above-described area, consists of two lanes of travel proceeding generally northbound and two lanes of travel proceeding generally southbound. A large, unpaved grass median separates the northbound and southbound lanes of travel.

GENERAL ALLEGATIONS

XII.

On July 14, 2001, at approximately 5:00 p.m., Robert Louis Nipp was lawfully operating his 1991 Ford Crown Victoria in a generally southbound direction upon Interstate 35E in the vicinity of Lino Lakes, Minnesota. At the same time and place, defendant Marjorie Joan Martin was operating her leased 2001 Chevrolet Malibu in a generally northbound direction upon Interstate 35E in the vicinity of Lino Lakes, MN. At the time and place described above, defendant's Chevrolet Malibu motor vehicle, traveling at a high rate of speed, suddenly bolted across the divider median and entered the southbound lanes of Interstate 35E, causing a collision with the Nipp vehicle at highway speeds. As a direct result of the foregoing high-speed collision, Robert Louis Nipp and Virginia Ida Nipp were fatally injured. The Nipp's grandson, Andrew James Nipp, a passenger in the Nipp vehicle, was taken by ambulance to North Memorial Medical Center and admitted for injuries to his left leg, foot, head and face. As a result of the accident, the minor plaintiff has experienced developmental delays in speech and motor skills, and possibly other injuries yet to be determined.

XIII.

The fatal injuries sustained by Robert and Virginia Nipp were proximately caused by the negligence of defendant Marjorie Joan Martin. Consequently, the next-of-kin of Robert Louis Nipp and Virginia Ida Nipp have sustained a permanent and final loss of all elements of their ongoing relationship with their parents, including, but not limited to, the loss of their services, counseling and advice and other natural and normal losses flowing from the previously existing familial relationships including, but not limited to, loss of their care, comfort, society, assistance and guidance, all to each heir's pecuniary damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000.00).

XIV.

As a direct result of the death of Robert Louis Nipp and Virginia Ida Nipp, proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, has been required to expend sums of money for medical bills, reasonable funeral and burial expenses and related items, all to her damage in a sum presently estimated to be in excess of Ten Thousand Dollars (\$10,000.00).

XV.

As a direct result of the above-described collision and the negligence of defendant the minor plaintiff, Andrew James Nipp, has sustained injuries to his person which injuries, upon information and belief, are disabling and permanent, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

XVI.

As a direct result of the trauma sustained by minor plaintiff Andrew James Nipp,

proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, Allan J. Nipp, individually, and as father and natural guardian for Andrew James Nipp, has been required to expend sums of money for medical bills and related items, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

NEGLIGENCE OF MARJORIE JOAN MARTIN

XVII.

Plaintiffs Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, reallege and incorporate the above allegations by reference as if set forth more fully below.

XVIII.

At the above-described time and place, defendant Marjorie Joan Martin negligently, carelessly and unlawfully operated the subject 2001 Chevrolet Malibu motor vehicle, causing a collision with the motor vehicle operated by Robert Louis Nipp. Illustrations of such negligent, careless and unlawful conduct of defendant Marjorie Joan Martin, cited by way of example, but not limitation, are the following:

- A. Defendant Marjorie Joan Martin failed and neglected to maintain the required degree of attention in her operation of the 2001 Chevrolet Malibu rental vehicle;

B. Defendant Marjorie Joan Martin's inattentiveness resulted in her losing complete control of the 2001 Chevrolet Malibu rental vehicle;

C. Defendant Marjorie Joan Martin was operating the 2001 Chevrolet Malibu rental vehicle at a speed in excess of the posted speed limit at the time of and prior to the subject occurrence;

D. Defendant Marjorie Joan Martin failed and neglected to keep the 2001 Chevrolet Malibu rental vehicle on the proper side of the highway within its designated northbound lane of travel and otherwise failed to exercise due care in the operation of the vehicle, including her failing to operate said vehicle in accordance with the laws of the State of Minnesota, the rules of the road and in a generally responsible manner prior to the above-described occurrence; and defendant Marjorie Joan Martin was negligent, careless and unlawful in other ways too numerous to herein mention.

XIX.

Defendant Marjorie Joan Martin committed the above-described negligent, careless and unlawful acts and omissions while operating a motor vehicle upon a public thoroughfare of the State of Minnesota. As a direct and proximate result of the above-described negligence, Robert Louis Nipp and Virginia Ida Nipp sustained fatal injuries which resulted in the damages alleged to the next of kin of Robert and Virginia Nipp.

XX.

As a direct and proximate result of the above-described negligence of defendant,

the minor plaintiff, Andrew James Nipp, sustained traumatic injuries to his person, which injuries have resulted in the alleged damages to the minor plaintiff and to Allan J. Nipp, his father and natural guardian.

Negligence as to ANC Rental Corporation and its subsidiary Alamo Rent-A-Car, LLC

VICARIOUS LIABILITY

XXI.

Plaintiffs Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, reallege and incorporate the above allegations by reference as if set forth more fully below.

XXII.

Defendant ANC Rental Corporation and its subsidiary Alamo Rent-A-Car, LLC as the owner of the vehicle causing the deaths of Robert Louis Nipp and Virginia Ida Nipp, and the injuries to minor plaintiff Andrew Nipp, is vicariously liable for the negligence, carelessness and unlawful conduct of the driver of its vehicle, Marjorie Joan Martin, deemed to be defendant Alamo's agent under the provisions of Minn. Statute § 170.54.

WHEREFORE, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, prays for judgment against the defendants in an amount in excess of Fifty Thousand Dollars (\$50,000.00), together with her costs and disbursements herein and reasonable attorneys' fees, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, prays for judgment against the

defendants in an amount in excess of Fifty Thousand Dollars (\$50,000), together with costs his
and disbursements herein and reasonable attorneys' fees.

Dated this 25th day of April, 2003.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Leo Feeney
Leo F. Feeney (#28599)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

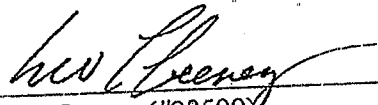
ATTORNEYS FOR PLAINTIFFS

**ACKNOWLEDGMENT REQUIRED BY
MINN. STAT. SEC. 549.211, SUBD. 2**

The undersigned hereby acknowledges that, pursuant to Minn. Stat. Sec. 549.211, subd. 2, costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the Court.

Dated this 25th day of April, 2003.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: 
Leo F. Feeney (#28599)

2800 LaSalle Plaza
800 LaSalle Avenue
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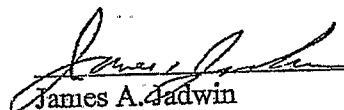
ATTORNEYS FOR PLAINTIFFS

AFFIDAVIT OF SERVICE BY HAND DELIVERY


STATE OF MINNESOTA)

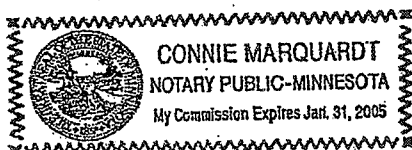
COUNTY OF HENNEPIN) ss

James A. Jadwin, being first duly sworn on oath, deposes and says, that on the 25th day of April, 2003, he made service of the attached Amended Summons and Amended Complaint by delivering a true and correct copy thereof to Alamo Rent-A-Car, LLC by leaving the above mentioned items with Tessa Kosky of the CT Corporation, 401 Second Avenue South, Suite 454, Minneapolis, Minnesota, 55401. The CT Corporation is the Registered Agent for Alamo Rent-A-Car, LLC.


James A. Jadwin

Subscribed and sworn to
before me this 28 day
of April, 2003.


Notary Public

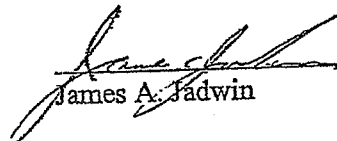


AFFIDAVIT OF SERVICE BY HAND DELIVERY

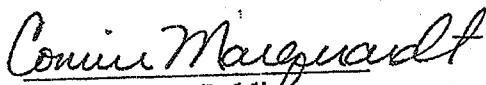
STATE OF MINNESOTA)

COUNTY OF HENNEPIN) ss

James A. Jadwin, being first duly sworn on oath, deposes and says, that on the 25th day of April, 2003, he made service of the attached Amended Summons and Amended Complaint by delivering a true and correct copy thereof to ANC Rental Corporation by leaving the above mentioned items with Tessa Kosky of the CT Corporation, 401 Second Avenue South, Suite 454, Minneapolis, Minnesota, 55401. The CT Corporation is the Registered Agent for ANC Rental Corporation.


James A. Jadwin

Subscribed and sworn to
before me this 28 day
of April, 2003.


Notary Public



MAR-12-2004 13:46

LABORE & GIULIANI, LTD

P.11/12

STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

File No. C7-02-8209

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and
Allan J. Nipp, as the parent and
natural guardian of the minor
Plaintiff Andrew James Nipp,

Plaintiffs,

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

WHEREAS, the above entitled matter came before the Honorable Richard G. Spicer, Judge of District Court, on October 30, 2003, at the Dakota County Judicial Center, Hastings, Minnesota, for post-trial motions.

WHEREAS, Leo Feeney, Esq., and Richard Gill, Esq., appeared on behalf of the Plaintiffs; Lee La Bore, Esq., appeared on behalf of Defendant Marjorie Martin; Louise Behrendt, Esq., appeared on behalf of Defendant ANC/Alamo.

FINDINGS OF FACT

1. The Defendants argue that Plaintiffs' counsel made improper closing arguments by misstating the law that was applicable to this case.
2. The Court gave what it felt to be proper curative instructions when it made the following two statements during final jury instructions: (1, given near the beginning of the instructions) "What the attorneys say about the law may differ from what I say. If this happens you must rely upon what I say the law is in this case." (2, given immediately before JIG 91.75) "No matter what the attorneys have argued to you in their final arguments, the law to be applied in this case is the law I am going to read you now."
3. After the verdict was entered in this case, the jury foreperson made certain statements regarding the jury deliberations that were printed in the St. Paul Pioneer Press newspaper. Defendants argue that these statements prove that the jury misapplied the law in reaching its verdict.
4. Defendants argue that a remittitur or new trial is appropriate because the jury verdict is excessive, in that it is shocking and results in plain injustice. See Hughes v. Sinclair Marketing, Inc., 389 N.W.2d 194 (Minn. 1986). Further, Defendants argue that a remittitur or new trial is appropriate because the verdict appears to have been given under the influence of passion or prejudice, and/or that the damages awarded are not justified by the evidence. See Baufeld v. Safelite Glass Corp., 831 F. Supp. 713 (D.Minn. 1993).
5. Defendant ANC/Alamo failed to comply with the rental car liability "cap" provisions of Minn. Stat. § 65B.49, subd. 5(a)(1)(2).

FILED DAKOTA COUNTY
W. A. BROSTROM, Court Administrator

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BY 2514
DEPUTY



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P.12/12

CONCLUSIONS OF LAW

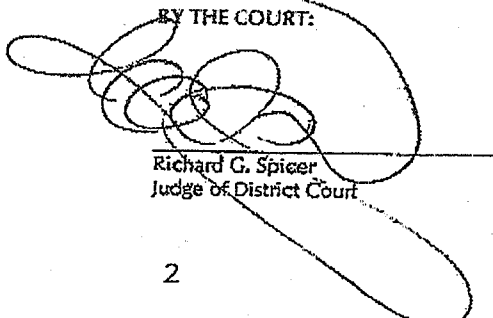
1. This Court need not pass on the question of whether Plaintiffs' counsel's closing arguments were proper.
2. Regardless of whether or not Plaintiffs' attorney's closing argument contained misstatements of the law to be applied in this case, the jury received proper curative instructions in this matter when the Court expressly instructed the jurors that they must take and apply the law as given by the court and not as presented by counsel. See Risbee v. Ruppert, 235 N.W.2d 364, 370 (Minn. 1975); Muehlhauser v. Erickson, 621 N.W.2d 24, 30 (Minn. App. 2000).
3. Under Minn. R. Evid. 606(b), a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connections therewith. The Rule allows three exceptions, dealing chiefly with outside influences affecting the verdict, none of which exist in this case. As such, the Court cannot consider the jury foreperson's newspaper statements regarding the verdict, as they would not even be admissible if sworn to and made in open court.
4. In light of the fact that there are twelve Plaintiffs to be compensated for the death of two decedents, the jury award was not so excessive or shocking so as to constitute a plain injustice. Further, given the testimony and evidence presented during the trial, the Court cannot say that the damage award is not sufficiently justified by the evidence. There is no admissible evidence that the verdict was given under the influence of passion or prejudice.
5. By failing to meet the statutory requirements of Minn. Stat. § 65B.49, subd. 5(a)(1)(2), Defendant ANC/Alamo becomes a self-insured entity with uncapped liability. Under Hertz v. State Farm, 573 N.W.2d 686 (Minn. 1998), a self-insured rental car company is primary for providing liability coverage for any loss while a customer is operating a rental vehicle. The self-insured rental car company is treated as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as a named insured. See id. Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive users as additional unnamed insureds. As such, the liability of the permissive driver of the rented vehicle (here, Defendant Martin) would be fully covered by virtue of the omnibus clause. See id. Accordingly, Defendant Martin is indemnified by Defendant ANC/Alamo for the losses that were sustained while she was operating the rental vehicle.

ORDER

1. That the Defendants' motion for remittitur or a new trial is hereby denied.
2. That Defendant Martin's motion for amended findings of fact, conclusions of law, and order for judgment is hereby granted such that the following language is added:
 - a. That Defendant ANC/Alamo is the primary, self-insured obligor for the entire net verdict.
 - b. That Defendant Martin is to be indemnified by Defendant ANC/Alamo to the full extent of any net judgment entered in this matter.
 - c. That Defendant ANC/Alamo's cross-claim for indemnity against Defendant Martin is dismissed with prejudice.
3. That all other motion(s) not granted herein are denied.

Dated: October 31, 2003

BY THE COURT:



Richard G. Spicer
Judge of District Court

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

File No. C7-02-8209

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and
Allan J. Nipp, as the parent and
natural guardian of the minor
Plaintiff Andrew James Nipp,

Plaintiffs,

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

WHEREAS, the above entitled matter came before the Honorable Richard G. Spicer, Judge of District Court, on February 10, 2004, at the Dakota County Judicial Center, Hastings, Minnesota.

WHEREAS, Richard Gill, Esq., appeared on behalf of the Plaintiffs; Lee La Bore, Esq., appeared on behalf of Defendant Marjorie Martin; Robert Stich, Esq., appeared on behalf of Defendant ANC/Alamo.

FINDINGS OF FACT

1. Pursuant to the jury verdict in this matter and subsequent Order for Judgment, dated 9/24/03, Defendant Martin and ANC/Alamo are jointly and severally liable to the Plaintiffs for the amount of \$2,500,000.00.
2. Pursuant to the Court's Order of 10/31/03, which added language to the 9/24/03 Order, but did not replace the previous language, Defendant ANC/Alamo is the primary, self-insured obligor for the entire net verdict, and Defendant Martin is to be indemnified by Defendant ANC/Alamo to the full extent of any net judgment entered in this matter.

CONCLUSIONS OF LAW

1. From the papers submitted in support of the parties' motions, as well as the arguments made in court today, it is clear that while the parties agree that the Court's previous unappealed Orders are the law of this case, the parties do not agree on the meaning of those Orders. Therefore, the Court feels that clarification of those Order(s) is appropriate at this time. See Alvin v. Johnson, 71 N.W.2d 667, 668 (Minn. 1955); Minn. R. Civ. P. 60.02.

FILED
VAN A. BANISTER, DAKOTA COUNTY
Court Administrator

FEB 10 2004

BY

DCB
DEPUTY



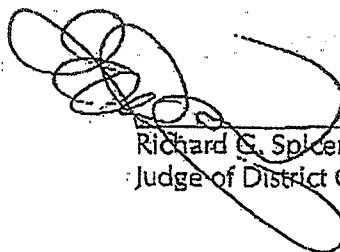
2. Although Defendant Martin ultimately has the right of indemnification against Defendant ANC/Alamo under the 10/31/03 Order, Defendant Martin remains jointly and severally liable to the Plaintiffs under the 9/24/03 Order. These provisions are entirely consistent with one another and neither was ever intended to negate the other. Likewise, the Court's statement that "Defendant ANC/Alamo is the primary, self-insured obligor for the entire net verdict" implies that a 'secondary' obligor (here, Defendant Martin) remains liable. This language was not intended to mean that Defendant ANC/Alamo now had sole liability in this case, to the exclusion of Defendant Martin. Further, the above-quoted language was intended to reflect Defendant ANC/Alamo's liability to Defendant Martin under principles of indemnification and was not intended to address issues involving self-insured entities under Minn. Stat. § 65B.48, subd. 3, or priority of insurance coverages under Minn. Stat. § 65B.49, subd. 3(3)(d).
3. Under Minn. R. Civ. P. 69, "in aid of the judgment or execution, the judgment creditor, ... may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules." Plaintiffs are entitled to discovery from Defendant Martin under Rule 69, as Defendant Martin remains a judgment debtor who is jointly and severally liable in this matter.

ORDER

1. That the Defendant Martin's motion to quash Plaintiffs' supplemental discovery and for a protective order is hereby denied.
2. That the Plaintiffs' motion for clarification of the Court's 10/31/03 Order is hereby granted as follows:
 - a. The Court's language stating that "Defendant ANC/Alamo is the primary, self-insured obligor for the entire net verdict" was intended to reflect Defendant ANC/Alamo's liability to Defendant Martin under principles of indemnification and was not intended to address issues involving self-insured entities under Minn. Stat. § 65B.48, subd. 3, or priority of insurance coverages under Minn. Stat. § 65B.49, subd. 3(3)(d).
 - b. Although Defendant Martin ultimately has the right of indemnification against Defendant ANC/Alamo under the 10/31/03 Order, Defendant Martin remains jointly and severally liable to the Plaintiffs under the 9/24/03 Order.
3. That all other motion(s) not granted herein are denied.

Dated: February 10, 2004

BY THE COURT:



Richard S. Spicer
Judge of District Court

MAR-26-2004 12:02

LABORE & GIULIANI, LTD

P.05/05

STATE FARM INSURANCE NORTH CENTRAL OFFICE WOODBURY, MINNESOTA U.S. BANK EAST GRAND FORKS, MINNESOTA 75-1582-012 1.05 206 433 0

CLAIM NUMBER 03-3237-342 DATE OF LOSS 7/14/01 NAME OF INSURED Marjorie Martin ISSUED DATE 3/24/04

PAY TO THE ORDER OF Judith V. Wahlberg, as trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp and their attorneys, Robins, Kaplan, ETAL

Two million, four hundred forty thousand dollars and no/100----- DOLLARS \$2,440,000.00

☒ STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ☐ STATE FARM INDEMNITY COMPANY

☐ STATE FARM COUNTY MUTUAL INSURANCE COMPANY OF TEXAS

☐ STATE FARM GENERAL INSURANCE COMPANY

☐ STATE FARM FIRE AND CASUALTY COMPANY

AUTHORIZED SIGNATURE *Cathy Houck* AUTH ID

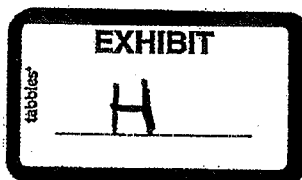
COMPANY LOGOS APPEAR ON BACK. HOLD AT 45° ANGLE FOR VIEWING

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TOTAL P.05

UNITED STATES BANKRUPTCY COURT DISTRICT OF DELAWARE		ADMINISTRATIVE CLAIM REQUEST
In re ANC Rental Corporation, <u>et al.</u> ,	Case Number 01-11200 (MFW) Jointly Administered	
NOTE: This form should only be used to make a claim for an administrative expense or substantial contribution under Section 503 of the Bankruptcy Code which arose after the commencement of these cases (November 13, 2001) and on or before January 30, 2004.		
Name of Creditor (The person or other entity to whom the debtor owes money or property): Marjorie Joan Martin c/o Fredrikson & Byron, P.A. 200 South Sixth Street Suite 4000 Minneapolis, MN 55402 Attention: Ryan T. Murphy (612) 492-7310	<input type="checkbox"/> Check box if you are aware that anyone else has filed a claim for administrative expense or substantial contribution relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.	
If address differs from above, please complete the following: Creditor Name: _____ Telephone #: _____ Address: _____ City/State/Zip: _____		
Account or other number by which creditor identifies debtor: N/A	Check here if <input type="checkbox"/> replaces <input type="checkbox"/> amends a previously filed claim, dated _____. <input type="checkbox"/> this claim	
1. Basis for Claim <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned	<input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input checked="" type="checkbox"/> Other <u>Indemnity</u>	
2. Date debt was incurred (must be after November 13, 2001 and on or before January 30, 2004):	3. If court judgment, date obtained (must be after November 13, 2001 and on or before January 30, 2004): 10/31/2003; exhibits attached	
4. Total Amount of Claim: \$ <u>2,440,000.00</u> <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Credits: The amount of all payments on this claim should be credited and deducted for the purpose of making this administrative claim request. 6. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. 7. Administrative Claim Bar Date: This claim must be filed with the United States Bankruptcy for the District of Delaware on or before March 18, 2004, at 4:00 p.m. (prevailing eastern time) with a copy: (i) ANC Administrative Claims c/o Wilmer Cutler & Pickering, 399 Park Avenue, New York, New York 10022 and (ii) ANC Administrative Claims c/o Blank Rome, LLP, 1201 Market Street, Suite 800, Wilmington, DE 19801.		This Space Is for the Debtors' Use Only
Date 3/10/2004	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney if any): Ryan T. Murphy	
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.		



115586.01600/40133050v1

ATTACHMENTS

1. Original Summons and Complaint – Exhibit A.
2. Amended Summons and Complaint – Exhibit B.
3. Answer – Exhibit C.
3. Findings of Fact, Conclusion of Law, and Order dated October 31, 2003 – Exhibit D.
4. Findings of Fact, Conclusions of Law, and Order dated February 10, 2003 – Exhibit E.

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MAR-09-2004 14:55

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P.21/30

WOODBURY

MAY 3 2002

CLAIM SERVICE OFFICE
DISTRICT COURT

STATE OF MINNESOTA

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

SUMMONS

v.

Marjorie Joan Martin,

Defendant.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon plaintiffs' attorneys an Answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

You are advised that under Rule 114 of the General Rules of Practice for the District Courts, all civil cases are subject to Alternative Dispute Resolution (ADR) processes. Your attention is directed to the ADR options available under that rule.

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EXHIBIT A

MAR-09-2004 14:55 LABORE & GIULIANI, LTD
03/13/04 14:55:10 FAX 612-349-8500

P.22/38

MAY 8 2002

CLAIM SERVICE UNIT

Dated this 10th day of April, 2002.

ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.

By: Leo F. Feeney

Leo F. Feeney (#28599)

David J. Knob (#307282)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

MAR-09-2004 14:55 LABORE & GIULIANI, LTD
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P.23/30

MAY 3 2002

CLAIM DELIVERED BY MAIL

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT
CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

COMPLAINT

v.

Marjorie Joan Martin,

Defendant.

Plaintiffs, for their Complaint and cause of action against the above-named defendant,
states and allege as follows:

PARTIES

I.

On October 5, 2001, Judith V. Wahlberg was appointed Trustee for the next of kin
of Robert Louis Nipp and Virginia Ida Nipp, decedents, by Order of the Honorable Donald J. Venne,
Judge of District Court, Tenth Judicial District, County of Anoka, State of Minnesota, a copy of
which Order is attached as Exhibit A. The action on behalf of the survivors of decedents is brought
by Judith V. Wahlberg, in her appointed capacity as Trustee, against the above-named defendant in
compliance with the Minnesota Wrongful Death Statute, Minn. Stat. §573.02, et seq. The action on
behalf of the minor plaintiff, Andrew James Nipp, is brought by his parent and natural guardian, Allan
J. Nipp.

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MAR-09-2004 14:56 LABORE & GIULIANI, LTD
05/15/04 WED 11:20 FAX 601/040004

P.24/30

MAY 3 2002

CLAIM DIVISION

II.

At all times herein material, decedents Robert Louis Nipp and Virginia Ida Nipp, husband and wife, were citizens and residents of Dakota County, residing at the time of their deaths at 710 Marie Avenue, Mendota Heights, MN 55118.

III.

At all times herein material, Allan J. Nipp was and is the father and natural guardian of minor plaintiff Andrew James Nipp (DOB 9/28/99), residing in Dakota County, at 8195 190th Street East, Hastings, MN 55033.

IV.

Upon information and belief, and at all times herein material, defendant Marjorie Joan Martin was a citizen and resident of Pima County, Arizona, residing at 7590 Via Los Arbusto, Tucson, AZ 85750.

V.

At all times herein material, Trustee Judith V. Wahlberg was and is a resident of Saint Louis County, residing at 5069 Country Road, Mountain Iron, MN 55768.

VI.

The next of kin of decedents Robert and Virginia Nipp, together with their ages and relationship to decedents, are as follows:

<u>Name</u>	<u>Age</u>	<u>Relationship</u>
Christine S. Kelley	49	Daughter
Cynthia J. Nipp	46	Daughter
Judith V. Wahlberg	42	Daughter
Jeffrey R. Nipp	40	Son
Allan J. Nipp	38	Son
Amy L. Nipp	35	Daughter

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P.25/30

MAY 3 2002

CLAIM SETTING

FACTS

VII

At all times herein material, Robert Louis Nipp was the owner and operator of a 1991 Ford Crown Victoria bearing Minnesota license plate EGX 778. At all times herein material, Virginia Ida Nipp, the wife of Robert Louis Nipp, was a passenger in the above-described motor vehicle. At all times herein material, Andrew James Nipp, the minor plaintiff and grandson of Robert and Virginia Nipp, was a passenger in the above-described motor vehicle.

VIII

At all times herein material, defendant Marjorie Joan Martin was in possession of and operating a 2001 Chevrolet Malibu bearing Minnesota license plate GGR 759. At the time of the collision, the 2001 Chevrolet Malibu was leased by defendant Marjorie Joan Martin from Alamo Rent-A-Car, Inc., a Florida corporation. Upon information and belief, Alamo Rent-A-Car, Inc. was the registered owner of the vehicle being operated by defendant Marjorie Joan Martin at the time of the collision.

IX

Upon information and belief, Alamo Rent-A-Car, Inc. engages in vehicle leasing services; i.e., providing vehicles for the public to lease, and, as part of its business, leased the above-described vehicle to defendant Marjorie Joan Martin from its business premises at the Minneapolis/St. Paul International Airport on July 14, 2001.

X

At all times herein material, Interstate highway 35E was a duly dedicated public thoroughfare located within the city of Lino Lakes, county of Anoka, state of Minnesota. Said highway, as it proceeds through the above-described area, consists of two lanes of travel

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MAY 3 2002
WOODHURST
CLAIM SERVICE
MAY 3 2002

proceeding generally northbound and two lanes of travel proceeding generally southbound. A large, unpaved grass median separates the northbound and southbound lanes of travel.

GENERAL ALLEGATIONS

XI.

On July 14, 2001, at approximately 5:00 p.m., Robert Louis Nipp was lawfully operating his 1991 Ford Crown Victoria in a generally southbound direction upon Interstate 35E in the vicinity of Lino Lakes, Minnesota. At the same time and place, defendant Marjorie Joan Martin was operating her leased 2001 Chevrolet Malibu in a generally northbound direction upon Interstate 35E in the vicinity of Lino Lakes, MN. At the time and place described above, defendant's Chevrolet Malibu motor vehicle, traveling at a high rate of speed, suddenly bolted across the divider median and entered the southbound lanes of Interstate 35E, causing a collision with the Nipp vehicle at highway speeds. As a direct result of the foregoing high-speed collision, Robert Louis Nipp and Virginia Ida Nipp were fatally injured. The Nipp's grandson, Andrew James Nipp (DOB 9/28/99), a passenger in the Nipp vehicle, was taken by ambulance to North Memorial Medical Center and admitted for injuries to his left leg, foot, head and face. As a result of the accident, the minor child ceased ambulating and does not verbally communicate.

XII.

The fatal injuries sustained by Robert and Virginia Nipp were proximately caused by the negligence of defendant Marjorie Joan Martin. Consequently, the next-of-kin of Robert Louis Nipp and Virginia Ida Nipp have sustained a permanent and final loss of all elements of their ongoing relationship with their parents, including, but not limited to, the loss of their services, counseling and advice and other natural and normal losses flowing from the previously existing familial relationships including, but not limited to, loss of their care, comfort, society,

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MAY 3 2002

CLAIM SERVICE UNIT

assistance and guidance, all to each heir's pecuniary damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000.00).

XIII.

As a direct result of the death of Robert Louis Nipp and Virginia Ida Nipp, proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, has been required to expend sums of money for medical bills, reasonable funeral and burial expenses and related items, all to her damage in a sum presently estimated to be in excess of Ten Thousand Dollars (\$10,000.00).

XIV.

As a direct result of the above-described collision and the negligence of defendant the minor plaintiff, Andrew James Nipp, has sustained injuries to his person which injuries, upon information and belief, are disabling and permanent, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

XV.

As a direct result of the trauma sustained by minor plaintiff Andrew James Nipp, proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, Allan J. Nipp, individually, and as father and natural guardian for Andrew James Nipp, has been required to expend sums of money for medical bills and related items, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

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MAY 3 2002

CLAIM SERVICE OFFICE

NEGLIGENCE OF MARJORIE JOAN MARTIN

XVI

Plaintiffs Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, reallege and incorporate the above allegations by reference as set forth more fully below.

XVII

At the above-described time and place, defendant Marjorie Joan Martin negligently, carelessly and unlawfully operated the subject 2001 Chevrolet Malibu motor vehicle, causing a collision with the motor vehicle operated by Robert Louis Nipp. Illustrations of such negligent, careless and unlawful conduct of defendant Marjorie Joan Martin, cited by way of example, but not limitation, are the following:

- A. Defendant Marjorie Joan Martin failed and neglected to maintain the required degree of attention in her operation of the 2001 Chevrolet Malibu rental vehicle;
- B. Defendant Marjorie Joan Martin's inattentiveness resulted in her losing complete control of the 2001 Chevrolet Malibu rental vehicle;
- C. Defendant Marjorie Joan Martin was operating the 2001 Chevrolet Malibu rental vehicle at a speed in excess of the posted speed limit at the time of and prior to the subject occurrence;
- D. Defendant Marjorie Joan Martin failed and neglected to keep the 2001 Chevrolet Malibu rental vehicle on the proper side of the highway within its designated northbound lane of travel and otherwise failed to exercise due care in

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MAY 3 2002

CLAIM SUBMITTED

the operation of the vehicle, including her failing to operate said vehicle in accordance with the laws of the State of Minnesota, the rules of the road and in a generally responsible manner prior to the above-described occurrence; and defendant Marjorie Joan Martin was negligent, careless and unlawful in other ways too numerous to herein mention.

XVIII.

Defendant Marjorie Joan Martin committed the above-described negligent, careless and unlawful acts and omissions while operating a motor vehicle upon a public thoroughfare of the State of Minnesota. As a direct and proximate result of the above-described negligence, Robert Louis Nipp and Virginia Ida Nipp sustained fatal injuries which resulted in the damages alleged to the next of kin of Robert and Virginia Nipp.

XIX.

As a direct and proximate result of the above-described negligence of defendant, the minor plaintiff, Andrew James Nipp, sustained traumatic injuries to his person, which injuries have resulted in the alleged damages to the minor plaintiff and to Allan J. Nipp, his father and natural guardian.

WHEREFORE, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, prays for judgment against the defendant in an amount in excess of Fifty Thousand Dollars (\$50,000.00), together with costs and disbursements herein and reasonable attorneys' fees and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, prays for judgment against the defendant in an amount in excess of Fifty Thousand Dollars (\$50,000), together with costs and disbursements herein and reasonable attorneys' fees.

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MAY 8 2002

CLAIM OUTSIDE OFFICE

Dated this 10th day of April, 2002.

ROBINS, KAPLAN, MILLER & CIRESI LLP.

By:

Leo F. Feeney
Leo F. Feeney (#285998)
David J. Koob (#307282)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

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CLAIMS SERVICE OFFICE

ACKNOWLEDGMENT REQUIRED BY
MINN. STAT. SEC. 549.211, SUBD. 2

The undersigned hereby acknowledges that, pursuant to Minn. Stat. Sec. 549.211, subd. 2, costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the Court.

Dated this 10th day of April, 2002.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Leo Feeney

Leo F. Feeney (#28599)

David J. Koob (#307282)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

MAR-09-2004 14:49

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P.03/30

STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

AMENDED SUMMONS

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:-

You are hereby summoned and required to serve upon plaintiffs' attorneys an Answer to the Amended Complaint which is herewith served upon you, within twenty (20) days after service of this Amended Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Amended Complaint.

You are advised that under Rule 114 of the General Rules of Practice for the District Courts, all civil cases are subject to Alternative Dispute Resolution (ADR) processes. Your attention is directed to the ADR options available under that rule.

15060572.1

EXHIBIT B

MAR-09-2004 14:50

LABORE & GIULIANI, LTD

P.04/30

Dated this 25th day of April, 2003.

ROBINS, KAPLAN, MILLER & CIRESI, LLP.

By: Leo F. Feeney
Leo F. Feeney (#28599)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

MAR-09-2004 14:50

LABORE & GIULIANI, LTD

P.05/30

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

CASE TYPE: WRONGFUL DEATH
& PERSONAL INJURY

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and Allan
J. Nipp, as the parent and natural guardian
of the minor plaintiff Andrew James Nipp,

Plaintiffs,

AMENDED COMPLAINT

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

Plaintiffs, for their Amended Complaint and cause of action against the above-named

defendants, states and alleges as follows:

PARTIES

I.

On October 5, 2001, Judith V. Wahlberg was appointed Trustee for the next of kin
of Robert Louis Nipp and Virginia Ida Nipp, decedents, by Order of the Honorable Donald J. Venne,
Judge of District Court, Tenth Judicial District, County of Anoka, State of Minnesota, a copy of
which Order is attached as Exhibit A. The action on behalf of the survivors of decedents is brought
by Judith V. Wahlberg, in her appointed capacity as Trustee, against the above-named defendant in
compliance with the Minnesota Wrongful Death Statute, Minn. Stat. §573.02, et seq. The action on

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P.06/30

behalf of the minor plaintiff, Andrew James Nipp, is brought by his parent and natural guardian,

Allan J. Nipp.

II.

At all times herein material, decedents Robert Louis Nipp and Virginia Ida Nipp, husband and wife, were citizens and residents of Dakota County, residing at the time of their deaths at 710 Marie Avenue, Mendota Heights, MN 55118.

III.

At all times herein material, Allan J. Nipp was and is the father and natural guardian of minor plaintiff Andrew James Nipp (DOB 9/28/99), residing in Dakota County, at 8195 190th Street East, Hastings, MN 55033.

IV.

Upon information and belief, and at all times herein material, defendant Marjorie Joan Martin was a citizen and resident of Pima County, Arizona, residing at 7590 Via Los Arbusto, Tucson, AZ 85750.

V.

At all times herein material, Trustee Judith V. Wahlberg was and is a resident of Saint Louis County, residing at 5069 Country Road, Mountain Iron, MN 55768.

VI.

The next of kin of decedents Robert and Virginia Nipp, together with their ages and relationship to decedents, are as follows:

<u>Name</u>	<u>Age</u>	<u>Relationship</u>
Christine S. Kelley	49	Daughter

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P.07/30

Cynthia J. Nipp	46	Daughter
Judith V. Wahlberg	42	Daughter
Jeffrey R. Nipp	40	Son
Allan I. Nipp	38	Son
Amy L. Nipp	35	Daughter

VII.

At all times herein material, ANC Rental Corporation, a Delaware Corporation and its subsidiary Alamo Rent-A-Car, LLC operates one of the world's largest car rental businesses. On information and belief on July 14, 2001 Alamo, at its Minneapolis airport location, rented a Chevrolet Malibu to defendant Marjorie Joan Martin. On November 13, 2001, Defendant ANC Rental Corporation, and its subsidiary Alamo Rent-A Car, LLC filed a Chapter 11 Petition in U.S. Bankruptcy Court for the District of Delaware. In that action, Judith Wahlberg, as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and minor plaintiff Andrew Nipp, by and through his parent and natural guardian, Allan Nipp, are named as unsecured creditors.

On April 10, 2003 an Order signed by the Honorable Mary F. Wallraff, Judge, United States Bankruptcy Court for the District of Delaware, granted relief from the automatic bankruptcy stay allowing plaintiffs to amend their Complaint to add ANC Rental Corporation, and its subsidiary Alamo Rent-A-Car, LLC as a defendant to this action. This Amended Complaint is being brought under the authority of that Order, attached hereto as Exhibit B.

MAR-09-2004 14:51

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P.08/30

FACTS

VIII.

At all times herein material, Robert Louis Nipp was the owner and operator of a 1991 Ford Crown Victoria bearing Minnesota license plate EGX 778. At all times herein material, Virginia Ida Nipp, the wife of Robert Louis Nipp, was a passenger in the above-described motor vehicle. At all times herein material, Andrew James Nipp, the minor plaintiff and grandson of Robert and Virginia Nipp, was a passenger in the above-described motor vehicle.

IX.

At all times herein material, defendant Marjorie Joan Martin was in possession of and operating a 2001 Chevrolet Malibu bearing Minnesota license plate GGR 759. At the time of the collision, the 2001 Chevrolet Malibu was leased by defendant Marjorie Joan Martin from Alamo Rent-A-Car, LLC. Upon information and belief, Alamo Rent-A-Car, LLC was the registered owner of the vehicle being operated by defendant Marjorie Joan Martin at the time of the collision.

X.

Upon information and belief, Alamo Rent-A-Car, LLC engages in vehicle leasing services; i.e., providing vehicles for the public to lease, and, as part of its business, leased the above-described vehicle to defendant Marjorie Joan Martin from its business premises at the Minneapolis/St. Paul International Airport on July 14, 2001.

XI.

At all times herein material, Interstate highway 35E was a duly dedicated public

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thoroughfare located within the city of Lino Lakes, county of Anoka, state of Minnesota. Said highway, as it proceeds through the above-described area, consists of two lanes of travel proceeding generally northbound and two lanes of travel proceeding generally southbound. A large, unpaved grass median separates the northbound and southbound lanes of travel.

GENERAL ALLEGATIONS

XII.

On July 14, 2001, at approximately 5:00 p.m., Robert Louis Nipp was lawfully operating his 1991 Ford Crown Victoria in a generally southbound direction upon Interstate 35E in the vicinity of Lino Lakes, Minnesota. At the same time and place, defendant Marjorie Joan Martin was operating her leased 2001 Chevrolet Malibu in a generally northbound direction upon Interstate 35E in the vicinity of Lino Lakes, MN. At the time and place described above, defendant's Chevrolet Malibu motor vehicle, traveling at a high rate of speed, suddenly bolted across the divider median and entered the southbound lanes of Interstate 35E, causing a collision with the Nipp vehicle at highway speeds. As a direct result of the foregoing high-speed collision, Robert Louis Nipp and Virginia Ida Nipp were fatally injured. The Nipp's grandson, Andrew James Nipp, a passenger in the Nipp vehicle, was taken by ambulance to North Memorial Medical Center and admitted for injuries to his left leg, foot, head and face. As a result of the accident, the minor plaintiff has experienced developmental delays in speech and motor skills, and possibly other injuries yet to be determined.

XIII.

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The fatal injuries sustained by Robert and Virginia Nipp were proximately caused by the negligence of defendant Marjorie Joan Martin. Consequently, the next-of-kin of Robert Louis Nipp and Virginia Ida Nipp have sustained a permanent and final loss of all elements of their ongoing relationship with their parents, including, but not limited to, the loss of their services, counseling and advice and other natural and normal losses flowing from the previously existing familial relationships including, but not limited to, loss of their care, comfort, society, assistance and guidance, all to each heir's pecuniary damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000.00).

XIV.

As a direct result of the death of Robert Louis Nipp and Virginia Ida Nipp, proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, plaintiff Judith Y. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, has been required to expend sums of money for medical bills, reasonable funeral and burial expenses and related items, all to her damage in a sum presently estimated to be in excess of Ten Thousand Dollars (\$10,000.00).

XV.

As a direct result of the above-described collision and the negligence of defendant the minor plaintiff, Andrew James Nipp, has sustained injuries to his person which injuries, upon information and belief, are disabling and permanent, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

XVI.

As a direct result of the trauma sustained by minor plaintiff Andrew James Nipp,

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proximately caused and contributed to by the negligence of defendant Marjorie Joan Martin, as set forth herein, Allan J. Nipp, individually, and as father and natural guardian for Andrew James Nipp, has been required to expend sums of money for medical bills and related items, all to his damage in a sum presently estimated to be in excess of Fifty Thousand Dollars (\$50,000).

NEGLIGENCE OF MARJORIE JOAN MARTIN

XVII.

Plaintiffs Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, reallege and incorporate the above allegations by reference as if set forth more fully below.

XVIII.

At the above-described time and place, defendant Marjorie Joan Martin negligently, carelessly and unlawfully operated the subject 2001 Chevrolet Malibu motor vehicle, causing a collision with the motor vehicle operated by Robert Louis Nipp. Illustrations of such negligent, careless and unlawful conduct of defendant Marjorie Joan Martin, cited by way of example, but not limitation, are the following:

A. Defendant Marjorie Joan Martin failed and neglected to maintain the required degree of attention in her operation of the 2001 Chevrolet Malibu rental vehicle;

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B. Defendant Marjorie Joan Martin's inattentiveness resulted in her losing complete control of the 2001 Chevrolet Malibu rental vehicle;

C. Defendant Marjorie Joan Martin was operating the 2001 Chevrolet Malibu rental vehicle at a speed in excess of the posted speed limit at the time of and prior to the subject occurrence;

D. Defendant Marjorie Joan Martin failed and neglected to keep the 2001 Chevrolet Malibu rental vehicle on the proper side of the highway within its designated northbound lane of travel and otherwise failed to exercise due care in the operation of the vehicle, including her failing to operate said vehicle in accordance with the laws of the State of Minnesota, the rules of the road and in a generally responsible manner prior to the above-described occurrence; and defendant Marjorie Joan Martin was negligent, careless and unlawful in other ways too numerous to herein mention.

XIX.

Defendant Marjorie Joan Martin committed the above-described negligent, careless and unlawful acts and omissions while operating a motor vehicle upon a public thoroughfare of the State of Minnesota. As a direct and proximate result of the above-described negligence, Robert Louis Nipp and Virginia Ida Nipp sustained fatal injuries which resulted in the damages alleged to the next of kin of Robert and Virginia Nipp.

XX.

As a direct and proximate result of the above-described negligence of defendant,

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the minor plaintiff, Andrew James Nipp, sustained traumatic injuries to his person, which injuries have resulted in the alleged damages to the minor plaintiff and to Allan J. Nipp, his father and natural guardian.

Negligence as to ANC Rental Corporation and its subsidiary Alamo Rent-A-Car, LLC

VICARIOUS LIABILITY

XXI.

Plaintiffs Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, reallege and incorporate the above allegations by reference as if set forth more fully below.

XXII.

Defendant ANC Rental Corporation and its subsidiary Alamo Rent-A-Car, LLC, as the owner of the vehicle causing the deaths of Robert Louis Nipp and Virginia Ida Nipp; and the injuries to minor plaintiff Andrew Nipp, is vicariously liable for the negligence, carelessness and unlawful conduct of the driver of its vehicle, Marjorie Joan Martin, deemed to be defendant Alamo's agent under the provisions of Minn. Statute § 170.54.

WHEREFORE, plaintiff Judith V. Wahlberg, individually, and as Trustee for the next of kin of Robert Louis Nipp and Virginia Ida Nipp, prays for judgment against the defendants in an amount in excess of Fifty Thousand Dollars (\$50,000.00), together with her costs and disbursements herein and reasonable attorneys' fees, and Allan J. Nipp, as father and natural guardian of minor plaintiff Andrew James Nipp, prays for judgment against the

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defendants in an amount in excess of Fifty Thousand Dollars (\$50,000), together with costs his
and disbursements herein and reasonable attorneys' fees.

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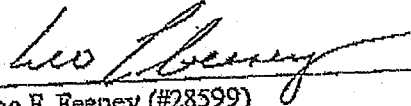
LABORE & GIULIANI, LTD

P.15/38

Dated this 25th day of April, 2003.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By:


Leo F. Feeney (#28599)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

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MAR-09-2004 14:53

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ACKNOWLEDGMENT REQUIRED BY
MINN. STAT. SEC. 549.211, SUBD. 2

The undersigned hereby acknowledges that, pursuant to Minn. Stat. Sec. 549.211, subd. 2, costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the Court.

Dated this 25th day of April, 2003.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Leo F. Feeney
Leo F. Feeney (#28599)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

ATTORNEYS FOR PLAINTIFFS

MAR-03-2004 15:00

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P.03/05

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT
FILE NO.

Judith V. Wahlberg, as Trustee)
for the next of kin of Robert)
Louis Nipp and Virginia Ida Nipp)
decedents, and Allan J. Nipp, as)
the parent and natural guardian)
of the minor Plaintiff, Andrew)
James Nipp,)

Plaintiffs,)

vs.)

Marjorie Joan Martin,)

Defendant.)

ANSWER

* * * *

Comes now the Defendant, and for her Answer to the Complaint
of the Plaintiffs, states and alleges as follows:

I.

Denies each and every allegation contained in Plaintiffs'
Complaint, save and except as hereinafter qualified or admitted.

II:

That she is without sufficient information to judge the truth
or falsity of Plaintiffs' Complaint and as a result, puts the
Plaintiffs to the strict proof thereof.

III.

Upon information and belief, admit paragraphs I, II, III,
IV, V, VI, VII, VIII, IX, and X of Plaintiffs' Complaint.

AFFIRMATIVE DEFENSES

IV.

As an affirmative defense the Defendant states that the

EXHIBIT C

MAR-09-2004 15:00

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Plaintiffs have failed to state a cause of action for which relief can be granted.

V.

As to the minor Plaintiff, Andrew James Nipp, the Defendant states that the Plaintiffs have failed to state a cause of action for which relief can be granted in that she has failed to fulfill a threshold requirement of Minnesota Statute §65B and related subdivisions therein.

IV.

WHEREFORE, the Defendant prays that the Plaintiffs take nothing by their pretended cause of action and that she be awarded her costs and disbursements herein.

LA BORE, GIULIANI, COSGRIFF &
VILTOFT, LTD.



Steven L Viltoft (190615)
Attorney for Defendant
P. O. Box 70
Hopkins, Minnesota, 55343
(952) 933-3371

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded, pursuant to Minn. Stat. Sec. 549.21, Subd. 2, to the party against whom the allegations in this pleading are asserted.



Steven L. Viltoft

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

File No. C7-02-8209

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and
Allan J. Nipp, as the parent and
natural guardian of the minor
Plaintiff Andrew James Nipp,

Plaintiffs,

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

WHEREAS, the above entitled matter came before the Honorable Richard G. Spicer, Judge of District Court, on October 30, 2003, at the Dakota County Judicial Center, Hastings, Minnesota, for post-trial motions.

WHEREAS, Leo Feeney, Esq., and Richard Gill, Esq., appeared on behalf of the Plaintiffs; Lee La Bore, Esq., appeared on behalf of Defendant Marjorie Martin; Louise Behrendt, Esq., appeared on behalf of Defendant ANC/Alamo.

FINDINGS OF FACT

1. The Defendants argue that Plaintiffs' counsel made improper closing arguments by misstating the law that was applicable to this case.
2. The Court gave what it felt to be proper curative instructions when it made the following two statements during final jury instructions: (1, given near the beginning of the instructions) "What the attorneys say about the law may differ from what I say. If this happens you must rely upon what I say the law is in this case." (2, given immediately before JIG 91.75) "No matter what the attorneys have argued to you in their final arguments, the law to be applied in this case is the law I am going to read you now."
3. After the verdict was entered in this case, the jury foreperson made certain statements regarding the jury deliberations that were printed in the St. Paul Pioneer Press newspaper. Defendants argue that these statements prove that the jury misapplied the law in reaching its verdict.
4. Defendants argue that a remittitur or new trial is appropriate because the jury verdict is excessive, in that it is shocking and results in plain injustice. See Hughes v. Sinclair Marketing, Inc., 389 N.W.2d 194 (Minn. 1986). Further, Defendants argue that a remittitur or new trial is appropriate because the verdict appears to have been given under the influence of passion or prejudice, and/or that the damages awarded are not justified by the evidence. See Baufeld v. Safelite Glass Corp., 831 F. Supp. 713 (D.Minn. 1993).
5. Defendant ANC/Alamo failed to comply with the rental car liability "cap" provisions of Minn. Stat. § 65B.49, subd. 5(a)(1)(2).

FILED DAKOTA COUNTY
WMA BROSTROM, Court Administrator

NOV 03 2003

BY

[Signature]

DEPUTY

EXHIBIT D

REC'D OCT 31 2003

CONCLUSIONS OF LAW

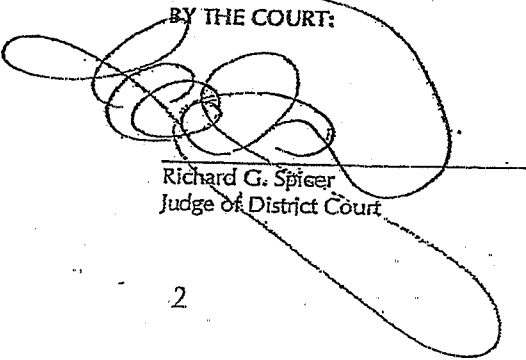
1. This Court need not pass on the question of whether Plaintiffs' counsel's closing arguments were proper.
2. Regardless of whether or not Plaintiffs' attorney's closing argument contained misstatements of the law to be applied in this case, the jury received proper curative instructions in this matter when the Court expressly instructed the jurors that they must take and apply the law as given by the court and not as presented by counsel. See Bisbee v. Ruppert, 235 N.W.2d 364, 370 (Minn. 1975); Muehlhauser v. Erickson, 621 N.W.2d 24, 30 (Minn. App. 2000).
3. Under Minn. R. Evid. 606(b), a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connections therewith. The Rule allows three exceptions, dealing chiefly with outside influences affecting the verdict, none of which exist in this case. As such, the Court cannot consider the jury foreperson's newspaper statements regarding the verdict, as they would not even be admissible if sworn to and made in open court.
4. In light of the fact that there are twelve Plaintiffs to be compensated for the death of two decedents, the jury award was not so excessive or shocking so as to constitute a plain injustice. Further, given the testimony and evidence presented during the trial, the Court cannot say that the damage award is not sufficiently justified by the evidence. There is no admissible evidence that the verdict was given under the influence of passion or prejudice.
5. By failing to meet the statutory requirements of Minn. Stat. § 65B.49, subd. 5(a)(1)(2), Defendant ANC/Alamo becomes a self-insured entity with uncapped liability. Under Hertz v. State Farm, 573 N.W.2d 686 (Minn. 1998), a self-insured rental car company is primary for providing liability coverage for any loss while a customer is operating a rental vehicle. The self-insured rental car company is treated as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as a named insured. See id. Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive users as additional unnamed insureds. As such, the liability of the permissive driver of the rented vehicle (here, Defendant Martin) would be fully covered by virtue of the omnibus clause. See id. Accordingly, Defendant Martin is indemnified by Defendant ANC/Alamo for the losses that were sustained while she was operating the rental vehicle.

ORDER

1. That the Defendants' motion for remittitur or a new trial is hereby denied.
2. That Defendant Martin's motion for amended findings of fact, conclusions of law, and order for judgment is hereby granted such that the following language is added:
 - a. That Defendant ANC/Alamo is the primary, self-insured obligor for the entire net verdict.
 - b. That Defendant Martin is to be indemnified by Defendant ANC/Alamo to the full extent of any net judgment entered in this matter.
 - c. That Defendant ANC/Alamo's cross-claim for indemnity against Defendant Martin is dismissed with prejudice.
3. That all other motion(s) not granted herein are denied.

Dated: October 31, 2003

BY THE COURT:



Richard G. Spicer
Judge of District Court

Davis, Marina

From: Murphy, Ryan
Sent: Friday, March 12, 2004 12:17 PM
To: Davis, Marina
Subject: RE: FedEx shipment 792449428532

please print for filing in La Bore. Thanks.

-----Original Message-----

From: Davis, Marina
Sent: Friday, March 12, 2004 12:16 PM
To: Murphy, Ryan
Subject: FW: FedEx shipment 792449428532

-----Original Message-----

From: sysdeliv@fn3a.prod.fedex.com [mailto:sysdeliv@fn3a.prod.fedex.com]
Sent: Friday, March 12, 2004 12:12 PM
To: Davis, Marina
Subject: FedEx shipment 792449428532

Our records indicate that the shipment sent from MARINA DAVIS/FREDRIKSON & BYRON, P.A to Claims XXX/U.S. Bankruptcy Court has been delivered.
The package was delivered on 03/12/2004 at 10:25 AM and signed for or released by C.ORKIS.

The ship date of the shipment was 03/10/2004.

The tracking number of this shipment was 792449428532.

FedEx appreciates your business. For more information about FedEx services, please visit our web site at <http://www.fedex.com>

To track the status of this shipment online please use the following:
http://www.fedex.com/cgi-bin/tracking?tracknumbers=792449428532&action=track&language=english&cntry_code=us

Disclaimer

FedEx has not validated the authenticity of any email address.

Fredrikson

& BYRON, P.A.

December 16, 2005

William J. Burnett, Esq.
901 North Market Street
Suite 840
Wilmington, DE 19801

Re: ANC Rental Corporation, Inc. et al.
Bky. Case No. 01-11200

Dear Mr. Burnett:

This firm represents Marjorie Joan Martin and State Farm Mutual Automobile Insurance Company ("State Farm"), Ms. Martin's auto insurer. On or about July 14, 2001, while driving a car leased from one of ANC Rental Corporation's ("ANC's") affiliates – Alamo Rent-A-Car, LLC ("Alamo"), Ms. Martin was involved in an accident in Dakota County, Minnesota. She collided with another vehicle in which Robert Lewis Nipp, Virginia Ida Nipp and Andrew James Nipp were traveling. Robert Lewis Nipp and Virginia Ida Nipp were fatally injured and Andrew James Nipp suffered injuries to his leg, foot, head and face.

Judith B. Walberg, as trustee for the next-of-kin of Robert Lewis Nipp and Virginia Ida Nipp (the "Trustee"), and Andrew James Nipp commenced a suit against Ms. Martin, Alamo, and ANC.¹ Ms. Martin filed and served an answer and crossclaim in which she denied liability and asserted a crossclaim for common law indemnity against ANC Rental Corporation.

¹ On April 10, 2003, the United States Bankruptcy Court for the District of Delaware entered an Order Approving Stipulation Granting Relief from the Automatic Stay. This allowed the Trustee and Ms. Martin to assert claims against Alamo and ANC without violating the automatic stay.

Attorneys & Advisors
main 612.492.7000
fax 612.492.7077
www.fredlaw.com

Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, Minnesota
55402-1425

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William J. Burnett, Esq.
December 16, 2005
Page 2

Shortly after commencing the action, the Trustee filed a series of proofs of claim in ANC's bankruptcy case, each in the approximate amount of \$3.5 million. Those claims were subsequently amended twice. The most recent proofs of claim number 6008-11 and 6013-14.

On September 24, 2003, the jury returned a \$2.5 million verdict in favor of the next-of-kin of Robert Lewis Nipp and Virginia Ida Nipp and found Alamo, ANC and Ms. Martin jointly and severally liable. On October 31, 2003, the Minnesota District Court found that by failing to meet the statutory requirements of Minn. Stat. § 65B.49 (Minnesota's No-Fault Automobile Insurance Statute), ANC and Alamo became self-insured entities with unlimited liability. As a result, the Minnesota District Court found that Ms. Martin was indemnified by ANC and Alamo to the full extent of any net judgment entered in the matter. See Exhibit A.

On or about January 2004, Ms. Martin and State Farm paid the Trustee on behalf of the next-of-kin of Robert Lewis Nipp and Virginia Ida Nipp \$2.44 million in full settlement of the judgment. The settlement agreement included an assignment of the Trustee's proofs of claim.

On March 12, 2004, Ms. Martin and State Farm duly and timely filed a proof of administrative claim in the amount of \$2.44 million pursuant to the Court's finding that Alamo and ANC must indemnify Ms. Martin. They will be moving shortly for the payment of that administrative expense claim.

On January 5, 2005, Ms. Martin and State Farm filed a Notice of Transfer of claims notifying all parties in interest that the Trustee's proofs of claim were transferred to them and that all future notices relating to those proofs of claim should be delivered to their attorneys, Fredrikson & Byron.

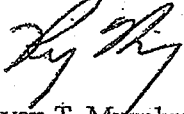
On November 17, 2005, the attorney for the Trustee forwarded a copy of the Motion of the ANC Liquidating Trust for an Order Establishing Procedures for the Treatment of Certain Pre-Petition Personal Injury Claims. That motion was not served on Ms. Martin or State Farm.

Although not specifically identified in the motion, ANC Liquidating Trust apparently believes that the claims originally filed by the Trustee and assigned to Ms. Martin and State Farm are "unresolved." As demonstrated above, the claims have been liquidated by final orders entered by the Minnesota District Court. Consequently, the amount of the claims have been determined for purposes of distribution.

William J. Burnett, Esq.
December 16, 2005
Page 3

If you disagree, please contact me. Please also ensure that any notice relating to proofs of claim numbers 6008-11 and 6013-14 (and the previously filed proofs of claim) are served upon this firm in accordance with the notice of transfer of claim.

Very truly yours,



Ryan T. Murphy

Direct Dial: 612.492.7310

Email: rmurphy@fredlaw.com

RTM:mgd:#3209445\1 - 49695.0001

Enclosure

cc: Lee LaBore

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT
File No. C7-02-8209

Judith V. Wahlberg, as Trustee for the
next of kin of Robert Louis Nipp and
Virginia Ida Nipp, decedents, and
Allan J. Nipp, as the parent and
natural guardian of the minor
Plaintiff Andrew James Nipp,

Plaintiffs,

v.

Marjorie Joan Martin, and ANC Rental
Corporation and its subsidiary Alamo
Rent-A-Car, LLC,

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

WHEREAS, the above entitled matter came before the Honorable Richard G. Spicer, Judge of District Court, on October 30, 2003, at the Dakota County Judicial Center, Hastings, Minnesota, for post-trial motions.

WHEREAS, Leo Feeney, Esq., and Richard Gill, Esq., appeared on behalf of the Plaintiffs; Lee La Bore, Esq., appeared on behalf of Defendant Marjorie Martin; Louise Behrendt, Esq., appeared on behalf of Defendant ANC/Alamo.

FINDINGS OF FACT

1. The Defendants argue that Plaintiffs' counsel made improper closing arguments by misstating the law that was applicable to this case.
2. The Court gave what it felt to be proper curative instructions when it made the following two statements during final jury instructions: (1, given near the beginning of the instructions) "What the attorneys say about the law may differ from what I say. If this happens you must rely upon what I say the law is in this case." (2, given immediately before JIG 91.75) "No matter what the attorneys have argued to you in their final arguments, the law to be applied in this case is the law I am going to read you now."
3. After the verdict was entered in this case, the jury foreperson made certain statements regarding the jury deliberations that were printed in the St. Paul Pioneer Press newspaper. Defendants argue that these statements prove that the jury misapplied the law in reaching its verdict.
4. Defendants argue that a remittitur or new trial is appropriate because the jury verdict is excessive, in that it is shocking and results in plain injustice. See Hughes v. Sindair Marketing, Inc., 389 N.W.2d 194 (Minn. 1986). Further, Defendants argue that a remittitur or new trial is appropriate because the verdict appears to have been given under the influence of passion or prejudice, and/or that the damages awarded are not justified by the evidence. See Baufeld v. Safelite Glass Corp., 831 F. Supp. 713 (D.Minn. 1993).
5. Defendant ANC/Alamo failed to comply with the rental car liability "cap" provisions of Minn. Stat. § 65B.49, subd. 5(a)(1)(2).

FILED DAKOTA COUNTY
WVA BROSTROM, Court Administrator

NOV 03 2003

BY [Signature]
DEPUTY



REC'D OCT 31 2003

CONCLUSIONS OF LAW

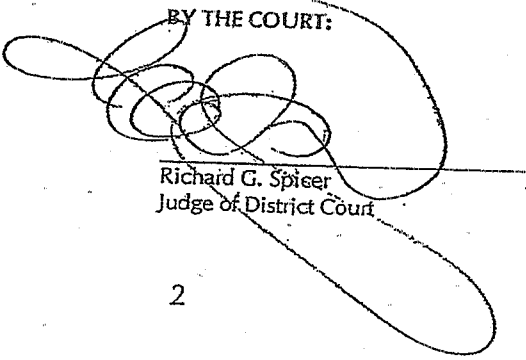
1. This Court need not pass on the question of whether Plaintiffs' counsel's closing arguments were proper.
2. Regardless of whether or not Plaintiffs' attorney's closing argument contained misstatements of the law to be applied in this case, the jury received proper curative instructions in this matter when the Court expressly instructed the jurors that they must take and apply the law as given by the court and not as presented by counsel. *See Bisbee v. Ruppert*, 235 N.W.2d 364, 370 (Minn. 1975); *Muehlhauser v. Erickson*, 621 N.W.2d 24, 30 (Minn. App. 2000).
3. Under Minn. R. Evid. 606(b), a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connections therewith. The Rule allows three exceptions, dealing chiefly with outside influences affecting the verdict, none of which exist in this case. As such, the Court cannot consider the jury foreperson's newspaper statements regarding the verdict, as they would not even be admissible if sworn to and made in open court.
4. In light of the fact that there are twelve Plaintiffs to be compensated for the death of two decedents, the jury award was not so excessive or shocking so as to constitute a plain injustice. Further, given the testimony and evidence presented during the trial, the Court cannot say that the damage award is not sufficiently justified by the evidence. There is no admissible evidence that the verdict was given under the influence of passion or prejudice.
5. By failing to meet the statutory requirements of Minn. Stat. § 65B.49, subd. 5(a)(1)(2), Defendant ANC/Alamo becomes a self-insured entity with uncapped liability. Under *Hertz v. State Farm*, 573 N.W.2d 686 (Minn. 1998), a self-insured rental car company is primary for providing liability coverage for any loss while a customer is operating a rental vehicle. The self-insured rental car company is treated as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as a named insured. *See id.* Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive users as additional unnamed insureds. As such, the liability of the permissive driver of the rented vehicle (here, Defendant Martin) would be fully covered by virtue of the omnibus clause. *See id.* Accordingly, Defendant Martin is indemnified by Defendant ANC/Alamo for the losses that were sustained while she was operating the rental vehicle.

ORDER

1. That the Defendants' motion for remittitur or a new trial is hereby denied.
2. That Defendant Martin's motion for amended findings of fact, conclusions of law, and order for judgment is hereby granted such that the following language is added:
 - a. That Defendant ANC/Alamo is the primary, self-insured obligor for the entire net verdict.
 - b. That Defendant Martin is to be indemnified by Defendant ANC/Alamo to the full extent of any net judgment entered in this matter.
 - c. That Defendant ANC/Alamo's cross-claim for indemnity against Defendant Martin is dismissed with prejudice.
3. That all other motion(s) not granted herein are denied.

Dated: October 31, 2003

BY THE COURT:



Richard G. Spicer
Judge of District Court